(12)

No. 93-609-CFX
Status: GRANTED

Title: Morgan Stanley & Co., Incorporated, et al., Petitioners
v.
Pacific Mutual Life Insurance Company

Docketed:
October 18, 1993

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Benkard,James W.B.

Counsel for respondent: Weltman,Stewart M., Edelman,Theodore, Cohen,Rpobert G., Figari Jr.,Ernest E., Gewertz,Theodore, Susman,Morton L., Hughes,Lyman G., Truitt,James L., Solicitor General, Taranto,Richard G.

Entry	Date	Note	Proceedings and Orders
1	Oct 5 1993	D	Application (A93-306) to extend the time to file a petition for a writ of certiorari from October 18, 1993 to December 1, 1993, submitted to Justice Scalia.
2	Oct 7 1993		Application (A93-306) denied by Justice Scalia.
3	Oct 18 1993	G	Petition for writ of certiorari filed.
5	Nov 17 1993		Order extending time to file response to petition until December 20, 1993.
6	Nov 18 1993		Brief of respondent Pacific Mutual Life Insurance Company in opposition filed.
8	Nov 29 1993		Brief of respondent United States filed.
7	Dec 1 1993		REDISTRIBUTED. January 7, 1994 (Page 1)
9	Dec 10 1993		Letter from the Solicitor General, including the Tenth Circuit's decision in Johnston, received and distributed. VIDED.
10	Dec 16 1993	X	Reply brief of petitioners First Republicbank Corporation, et al. filed.
11	Jan 10 1994		Petition GRANTED.
			**********
12	Feb 7 1994		Record filed.
		*	Original proceedings U.S. Court of Appeals for the Fifth Circuit and U.S.District Court, N.Dist. Texas (1 BOX).
13	Feb 7 1994		Record filed.
		*	Original record proceedings U.S.Court of Appeals,Fifth Circuit and U.S.District Court, E.Dist.Louisiana(2 BOXES)
14	Feb 24 1994		Joint appendix filed.
15	Feb 24 1994		Brief of petitioners First Republicbank Corporation, et al. filed.
16	Feb 24 1994		Brief amici curiae of Spendthrift Farm, Inc., et al. filed.
17	Mar 4 1994		CIRCULATED.
19	Mar 4 1994	G	Motion of respondents for divided argument filed.
18	Mar 7 1994		SET FOR ARGUMENT TUESDAY, APRIL 26, 1994. (2ND CASE).
20	Mar 21 1994		Motion of respondents for divided argument GRANTED. Justice O'Connor OUT.
21	Mar 25 1994	X	Brief amicus curiae of National Assn. of Securities and Commercial Law Attorneys filed.
22	Mar 28 1994	X	Brief of respondent Pacific Mutual Life Insurance Co. in

2pp

No. 93-609-CFX

Entry	Date	Note	Proceedings and Orders
			opposition filed.
23	Mar 28 1994	X	Brief of respondent United States filed.
24	Apr 19 1994	X	Reply brief of petitioners Morgan Stanley & Co., et al. filed.
25	Apr 26 1994		ARGUED.

(1)

No. 93-609

Supreme Court, U.S.
FILED
OCT 18 1993
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IN THE

Supreme Court of the United States

October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Ernst & Young

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Salomon Brothers Inc

* *Counsel of Record*

October 18, 1993

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and the due process clause of the United States Constitution.

LIST OF PARTIES

The following party was Plaintiff below and is Respondent before this Court:

Pacific Mutual Life Insurance Company

The following parties[1] were Defendants below and are Petitioners[2] before this Court:

Morgan Stanley & Co. Incorporated;
Goldman, Sachs & Co.
Ernst & Young, a Partnership;
Salomon Brothers Inc

Pursuant to Supreme Court Rule 29.4(b), Petitioners state that the constitutionality of an Act of Congress was drawn into question in the United States Court of Appeals for the Fifth Circuit. The United States intervened in the action, filed a brief in the Fifth Circuit and appeared at oral argument.

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1. First Republicbank Corp. and IFRB Corp. appeared in the caption of the opinion below, but were not parties to the proceeding in the United States Court of Appeals for the Fifth Circuit.

2. Pursuant to Supreme Court Rule 29.1, the parent or subsidiary companies of each Petitioner, other than wholly owned subsidiaries are as follows: Morgan Stanley Group Inc. is the parent of Morgan Stanley & Co. Incorporated; Goldman, Sachs & Co. is a partnership; Ernst & Young is a partnership; Salomon Inc is the parent of Salomon Brothers Inc.

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IN THE

Supreme Court of the United States

October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, filed July 20, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 997 F.2d 39 and is reprinted in the Appendix (''App.'') accompanying this Petition at pages A-1 to 35. The opinion of the United States District Court for the Northern District of Texas (Sanders, C.J.) is reported at 806 F. Supp. 108 and is reprinted at App. B-1 to 15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, section 1, of the United States Constitution states, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991) (''Section 27A''), provides in pertinent part:

> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time-barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

For more than 200 years, it has been settled law that Congress may not strip a private litigant of the right to a final judgment rendered by a court of the United States. This principle is premised on the separation of powers and due process doctrines that are as old as the Republic itself.

The Fifth Circuit has now breached this founding principle, brushing aside binding precedent of this Court as well as numerous decisions of other federal tribunals, and held that Section 27A(b) may resurrect a claim that had been finally dismissed, and as to which the time to appeal had expired.

Two weeks after the Fifth Circuit's decision, the Sixth Circuit reached the diametrically opposite result on the very same statute. Analyzing the same issue and the same cases, the Sixth Circuit explicitly rejected the holding of the Fifth Circuit and concluded that Section 27A(b) was ''an unconstitutional usurpation of the judiciary power.'' (*Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487, 1499 (6th Cir. 1993)).

In light of this stark conflict between two Circuits on issues of fundamental importance to our federal system of government, Petitioners respectfully urge the Court to grant the writ of certiorari sought by this Petition. This case enables the Court not only to clarify an important question of federal securities law, but also to reaffirm essential principles of constitutional law that have endured for centuries.

Initial Proceedings

On March 1, 1991, Respondent Pacific Mutual Life Insurance Company (''Respondent'' or ''Pacific Mutual'') commenced this action alleging claims based on Section 10(b) of the Securities Exchange Act of 1934 (the ''Exchange Act''), 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5,

promulgated thereunder, and common law fraud arising out of Respondent's 1987 purchases of debt instruments issued by Interfirst Corporation.

On June 20, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), this Court held that Section 10(b) actions must be commenced within one year of discovery of the facts constituting the alleged violation and not later than three years after such alleged violation. *Id.* at 2782. This Court applied this limitations period to the claims of the plaintiffs in *Lampf*.

In another decision issued on the same day, *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that when a principle of law is applied to the parties in the case before the Court, that principle also must be applied to all similarly situated parties in all other pending proceedings where such application is not barred by procedural requirements or final judgments. *Id.* at 2448 (Souter, J.). *See Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993) (''[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review . . .'').

Applying the holdings of this Court in *Lampf* and *Beam*, in a Memorandum Opinion and Order dated August 15, 1991, the District Court (Sanders, C.J.) dismissed with prejudice Pacific Mutual's Section 10(b) claim as time-barred and dismissed without prejudice the pendent state law claims. On August 16, 1991, the District Court's Order was entered as a final judgment pursuant to Fed. R. Civ. P. 58 and 79(a). Respondent did not appeal from that Order, and the time for an appeal expired.

Enactment of Section 27A

In reaction to *Lampf* and *Beam*, proposals to replace the ''one-year/three-year'' limitations period with a longer statute of limitations were introduced in Congress, but no such

proposed legislation was passed. Instead, a compromise addressing only cases pending at the time *Lampf* was decided was enacted into law on December 19, 1991. That law, codified as Section 27A of the Exchange Act, does not alter the limitations period of *Lampf*. Instead, it directs that the *Lampf* decision be disregarded in any private civil action commenced on or before June 19, 1991 (the last business day before the rulings in *Lampf* and *Beam* were announced), and that limitations rules pre-dating *Lampf* be applied to the action, regardless of whether the action was still pending, or had been dismissed by a final judgment that was no longer subject to appeal, on the effective date of the new legislation.

Section 27A(b), the only provision of the statute at issue in this case, provides that any private civil action arising under Section 10(b) that was commenced on or before June 19, 1991, that was dismissed as time-barred subsequent to June 19, 1991, and that would have been timely filed under the limitations period provided by the laws in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, ''shall be reinstated on motion by plaintiff not later than 60 days after the date of enactment of this section.'' Thus, Section 27A(b) purports to direct the federal courts (1) to set aside orders dismissing Section 10(b) claims as time-barred that had ripened into final judgments from which the time to appeal has expired prior to the effective date of Section 27A; and (2) to apply case law discredited by *Lampf*, contrary to the holding in *Beam* that a rule of federal law applied to the parties before this Court must be given retroactive effect in all pending cases.

The Decisions Below

On January 31, 1992, more than six months after the entry of the final judgment and order dismissing its action, Respondent filed a motion to reinstate that action pursuant to Section 27A(b). In a Memorandum Opinion and Order dated July 13, 1992, the District Court denied the motion to reinstate, holding that Section 27A(b) is unconstitutional. The District

Court entered a final order and judgment on July 17, 1992 denying Respondent's motion to reinstate.

The District Court found that Section 27A(b) "violates established separation of powers principles." 806 F. Supp. at 112; App. at B-6. The District Court stated that this Court's rulings on the inviolability of final judgments are controlling because even "[a] small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion." 806 F. Supp. at 113; App. at B-10.

The District Court further held that Section 27A(b) undermines "the finality of the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants as a result of such judgment." 806 F. Supp. at 112; App. at B-7. The District Court premised its decision on this Court's rulings in such cases as *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), and *McCullough* v. *Virginia*, 172 U.S. 102 (1898), that: "It is not within the power of a legislature to take away rights which have once vested by judgment [because] when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." 806 F.Supp. at 112; App. at B-8 to 9 (citing *McCullough*, 172 U.S. at 123-24).

On July 20, 1993, the Fifth Circuit issued its opinion reversing the District Court's order and finding Section 27A(b) constitutional. The Fifth Circuit expressly recognized that it was "proceed[ing] without the benefit of prior appellate attention to § 27A(b)." 997 F.2d at 43; App. at A-8. The Court of Appeals also acknowledged that it was required to turn for guidance to the decisions of this Court. But while the consistent holdings of this Court teach that legislation may not reopen a final, nonappealable judgment entered by an Article III court in an action between private parties, the Fifth Circuit nevertheless found that Section 27A(b) did not violate either the due process clause or the separation of powers doctrine.

The Fifth Circuit recognized that "the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments," 997 F.2d at 47; App. at A-16, and that "§ 27A(b) effectively nullifies these judgments." 997 F.2d at 46; App. at A-14. The Fifth Circuit went on to find, however, that "despite *McCullough* [*v. Virginia*], judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation." 997 F.2d at 49; App. at A-21. Instead, relying on decisions that concededly did *not* involve the application of a "retroactive statute to upset a final, nonappealable judgment," the Fifth Circuit found that retroactive legislation like Section 27A(b) can constitutionally nullify final judgments. 997 F.2d at 50; App. at A-20.

Further, the Fifth Circuit suggested that a private party's rights in a final judgment may be nullified simply by a showing that the legislature acted rationally toward the party asserting a due process violation. 997 F.2d at 50; App. at A-24. The Fifth Circuit further opined that retroactive legislation eviscerating final judgments of private parties should be entitled to no greater protection or "heightened scrutiny" under the due process clause than retroactive legislation affecting individuals' rights to money generally. 997 F.2d at 51 n.14; App. at A-26 n.14. The Fifth Circuit's determination that a private party's vested interest in a final, nonappealable judgment at law may be divested by retroactive legislation so long as a rational basis may be discerned conflicts with fundamental constitutional principles and established precedent of this Court.

On the issue of whether Section 27A(b) violates the separation of powers doctrine, the Fifth Circuit explicitly recognized that legislation reversing the results in particular controversies between private individuals would be "violative of our authority to decide cases." 997 F.2d at 54; App. at A-32 (citing *United States* v. *O' Grady*, 89 U.S. (22 Wall.) 641, 648 (1875)). The Fifth Circuit inexplicably concluded, however, that § 27A(b) was "harmless" under separation of

powers analysis because "[b]y upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done." 997 F.2d at 54; App. at A-32.

The Fifth Circuit's holding that retroactive legislation may upset a final judgment of an Article III court in an action between private parties is without precedent and raises serious implications under the separation of powers doctrine and due process clause of the Constitution.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE FEDERAL COURTS, AND BETWEEN THE FIFTH AND SIXTH CIRCUITS, ON THE CONSTITUTIONALITY OF SECTION 27A(b)

The Fifth Circuit's decision is directly contrary to that rendered on August 3, 1993, by the Sixth Circuit finding Section 27A(b) to be unconstitutional. *Plaut* v. *Spendthrift Farms*, 1 F.3d 1487 (6th Cir. 1993).[1]

In a scholarly opinion, the *Plaut* court traced the history of the separation of powers doctrine. The Sixth Circuit also reviewed the decisions of this Court on the separation of powers doctrine, commencing with *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and concluded that:

> the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts, and . . . adhere[d] to that rule as a protection of the separation of powers. We search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants.

Plaut, 1 F.3d at 1493 (footnote omitted).

The Sixth Circuit held that § 27A(b) contravened the rule of *Hayburn's Case* that proscribes legislative interference with the judgments of the courts under separation of powers principles. The Sixth Circuit stated that:

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1. Plaintiffs and the United States filed petitions for rehearing *en banc* and, pursuant to the direction of the Sixth Circuit, defendants-appellees filed a response on September 21, 1993. As of this date, the Sixth Circuit has not ruled on the petitions for rehearing *en banc*.

> If the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*. . . . Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with *Hayburn's Case*. The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792.

Id. at 1493 (footnote omitted).

The Sixth Circuit further stated that: "we believe the rule [of *Hayburn's Case*] to be not only alive but vital to the continuing integrity of the independent Federal judiciary . . .." *Id.* at 1494. Implicitly rejecting the Fifth Circuit's view that the legislature's intrusion on the courts' exercise of the judicial power under Section 27A(b) was "harmless," the Sixth Circuit noted that: "Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power." *Id.* at 1496. The Sixth Circuit referred to the "enormous consequences which would result to our system of government were the Congress's undisputed power to change the existing laws extended to allow it retroactively to change the prior *application* of those laws by the courts . . .." *Id.* at 1496.

Further, the Sixth Circuit rejected the Fifth Circuit's view that this Court had abandoned its holding in *McCullough* v. *Virginia*, that "[i]t is not within the power of a legislature to take away rights which have been once vested by judgment." *McCullough*, 172 U.S. 123-24. The Sixth Circuit stated that:

> we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court, or on us . . . [W]e note that *McCullough* remains good law, . . . even if the Supreme Court has not ruled on a similar case since.

Plaut, 1 F.3d at 1493 n.12 (citations omitted).

The Fifth Circuit's opinion also conflicts with the discussion of the constitutionality *vel non* of Section 27A(b) in the Second Circuit's recent opinion in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 1993 U.S. App. LEXIS 24954 (1993). The Second Circuit found defendant had no final judgment, and thus the court did not need to reach the issue of the constitutionality of Section 27A(b) in the context of final judgments. Nevertheless, the Second Circuit implicitly rejected the Fifth Circuit's dismissal of *McCullough* as outdated law, and echoed the Sixth Circuit's view that:

> Although *McCullough* is one of the few Supreme Court decisions finding a constitutional bar to the legislative nullification of a judgment, several subsequent decisions have restated the principle set forth in that case.

Axel Johnson, 1993 U.S. App. LEXIS at *15.

Similarly, in *Cooperativa De Ahorro y Credito Aquada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993), the court rejected defendants' constitutional attack on Section 27A(b) because no final judgment had been entered. The First Circuit went on to recognize that a party obtains a property right in a cause of action when " 'a final, unreviewable judgment has been obtained.' " *Id.* (citing *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986)).[2]

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2. Several circuit courts have upheld the constitutionality of Section 27A(a) as applied to cases in which there was no final, nonappealable judgment at the time Section 27A was enacted. *See Axel Johnson*, 1993 U.S. App. LEXIS 24954, at *7 (2d Cir. 1993) (collecting circuit decisions). Many of those same courts, however, expressly refused to decide the constitutionality of the application of 27A(b) to reinstate cases involving such final, nonappealable judgments. *See Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (expressing "no opinion" on constitutionality of overturning final judgments); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 277 (7th Cir. 1993). The Tenth Circuit has expressly refused to apply its decision in *Anixter* v. *Home Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841

This Court should grant the Petition and resolve the significant issues raised by the Fifth Circuit's decision, including the conflict in the federal courts[3] as to the constitutionality of Section 27A(b), and the continuing vitality of the Court's decisions in *Hayburn's Case*, *McCullough* v. *Virginia*, and their progeny. Only this Court can resolve the square conflict between the Fifth Circuit's decision in this case and the Sixth Circuit's decision in *Plaut* and provide guidance to the federal courts on whether the legislature can reopen final, unappealable judgments in actions between private parties, as required by Section 27A(b), in the face of the separation of powers and due process provisions of the Constitution.

(1993), involving the application of Section 27A(a) to a pending case, to a case in which a final judgment has been entered. *See Johnston* v. *Cigna Corp.*, Order No. 92-1180 (10th Cir. Nov. 25, 1992), in which the Tenth Circuit refused to summarily reverse the district court's finding that § 27A(b) cannot be constitutionally applied to final judgments.

3. The majority of district courts that have considered the constitutionality of Section 27A(b) have found it to be unconstitutional. *See Armijo* v. *E.F. Hutton & Co.*, No. Civ. 90-1064 JC, slip op. (D.N.M. Aug. 17, 1992) (holding § 27A(b) unconstitutional); *Dulude* v. *CIGNA Sec. Corp.*, 1992 WL 281411, at *2 (E.D. Mich. May 15, 1992) (same); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1059 (E.D. Mich. 1992) (same); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992) (same), *appeal pending*, No. 92-1186 (10th Cir.) (argued Sept. 27, 1993); *see also Atlantis Group, Inc.* v. *Rospatch Corp.*, 802 F. Supp. 110, 114 (W.D. Mich. 1992) (*dictum*); *but see Brown* v. *The Hutton Group*, 795 F. Supp. 1307 (S.D.N.Y. 1992) (holding § 27A(b) constitutional citing district court opinion in *Axel Johnson* and decided before the Second Circuit's recent opinion in *Axel Johnson*; also called into question with respect to the constitutionality of overturning final judgments by *Rabin* v. *Fivzar Assoc.*, 801 F. Supp. 1045, 1056 n.11 (S.D.N.Y. 1992)); *Casserly* v. *Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. (D. Minn. July 2, 1992).

II. THE FIFTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF DUE PROCESS AND SEPARATION OF POWERS IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Fifth Circuit's Opinion Conflicts With *Hayburn's Case* And The Separation of Powers Doctrine

The principle that the legislature may not modify or reverse the final judgment of a federal court has been settled constitutional law for more than 200 years. It derives from our system of federal government, which employs a separation of powers among the three branches of government as a safeguard against tyranny by any one branch. Thus, the Constitution expressly provides that "the judicial Power of the United States shall be vested" in the courts, Art. III, § 1, and not in the legislature "in whom no judicial power of any kind appears to be vested . . .." *Hayburn's Case*, 2 U.S. at 410 n.2. Accordingly, "Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power." *Plaut*, 1 F.3d at 1499. Until the Fifth Circuit's decision below, that fundamental principle had been consistently recognized and adhered to by the federal courts. *Id.* at 1496. *See also United States* v. *O'Grady*, 89 U.S. 641, 648 ("it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision . . . of any other department of the government").[4]

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4. *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948) (judgments "may not lawfully be revised or overturned or refused faith and credit by another Department."); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 n.25 (1940) (suggesting that legislation "affecting judicial judgments rather than administrative orders" could be an "excursion of the Congress into the judicial function"); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (following *Hayburn's Case*); *Humana Hosp. Corp., Inc,. v. Blankenbaker*, 734 F.2d 328, 332-33 (7th Cir. 1984) ("The Supreme Court con-

The rule in *Hayburn's Case* has ever since "been regarded as a constitutional law," *Gordon* v. *United States*, 117 U.S. 697, 703 (Appendix 1885), and "reflect[s] a proper understanding of the role of the Judiciary." *Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988). As the Court reiterated nearly 200 years later:

> It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress.

United States v. *Sioux Nation of Indians*, 448 U.S. 371, 398 (1979) (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1867)). The evisceration of the final judgment of an Article III court by the legislature is unconstitutional because it makes "substantial inroads into functions that have traditionally been performed by the judiciary." *Northern Pipeline*

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sistently has held from its earliest day, that no decision of a federal court may be reviewed by the legislative branch"); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974) ("superior legislative review" of judicial decisions is forbidden); *see also Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988) (same), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. ex rel. Diane K.* v. *Board of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (once "a court has disposed of a case, Congress may not dictate a different decision"); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981) ("neither Congress, the Executive, an Executive Agency nor a State Legislature may by subsequent acts negate, disregard or nullify the judgment of the Court already rendered"); *Cerro Metal Prods.* v. *Marshall*, 467 F. Supp. 869, 877-78 (E.D. Pa. 1979) (separation of powers bars an act of Congress which pronounces that "what had theretofore been judicially declared as law 'shall be deemed never to have had effect.' "), *aff'd*, 620 F.2d 964 (3d Cir. 1980). In its separation of powers analysis, the Fifth Circuit does not mention, let alone distinguish, any of these cases.

Constr. Co. v. *Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

The Fifth Circuit's view that § 27A(b)'s intrusion on the judicial power was "harmless" because it "at most denies us some authority to say when a controversy is over," 997 F.2d at 54, App. at A-32, reflects a misunderstanding of the role of the separation of powers doctrine in our form of government and the essence of the judicial power. The proper analysis of § 27A(b), in the context of the separation of powers doctrine, demonstrates that § 27A(b) constitutes not a "harmless" but instead a very substantial legislative intrusion upon the courts' exercise of the "judicial Power." As the *Plaut* court correctly found:

> [T]he case at bar clearly represents the irreducible minimum of the separation required to preserve the system's last vestiges of federalism. For if Congress may by legislation reverse or vacate the final judgments of the Federal Courts, then Congress has rendered the whole function of the judiciary futile: whether "the whole power of one department is exercised by the same hands which possess the whole power of another department," *Mistretta*, 488 U.S. at 381 (quoting The Federalist No. 47 (Madison)) is left subject only to the self-restraint of the legislature. As Jefferson wrote,
>
> > Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them .... The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.
>
> Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 121 (1784) (reprinted in Ralph Lerner and Philip B. Kurland, eds., 1 The Founders' Constitution 320 (1987)). Were the validity of the judgments of the judicial branch to depend on the approval of the legislative branch, how

> much more fully could the legislature increase its own powers at the expense of the judiciary, or usurp or undermine the powers belonging to the judicial branch? What part of the camel would then remain outside the tent?

Plaut, 1 F.3d at 1499.

In sum, this Court should intervene to determine this most fundamental and significant issue of constitutional law — whether by enactment of § 27A(b) Congress has intruded upon the "judicial Power" in violation of the Constitution.

B. The Fifth Circuit's Opinion Conflicts With *McCullough* and Its Progeny And the Due Process Clause

The Fifth Circuit concluded that *McCullough* is no longer good law, in large part, because "the Court has never applied this holding in *McCullough* to decide another case." 997 F.2d at 46; App. at A-15. This contention simply disregards subsequent decisions of this Court[5] and the lower federal courts[6]

5. *See Western Union Tel. Co* v. *Louisville & N.R. Co.*, 258 U.S. 13, 22 (1922) (rights can be withdrawn only before a "final and unreviewable determination"); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922). *See also Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) ("it is undoubtedly true that legislatures cannot set aside the judgments of courts").

6. Numerous lower courts have followed the rule of *McCullough*. *See Central States Southeast & Southwest Areas Pension Fund*, 960 F.2d 1339, 1345 (7th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989); *Daylo* v. *Administrator of Veterans Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974); *De Rodulfa* v. *United States*, 461 F.2d 1240, 1253 n.62 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972); *Adams* v. *Fidelity & Cas. Co. of N.Y.*, 147 F.R.D. 265, 268 (S.D. Fla. 1992); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 612 F. Supp. 643, 646 (D.D.C. 1985); *United States* v. *Board of Educ. of the City of Chicago*, 588 F. Supp. 132, 235 (N.D. Ill. 1984), *vacated on other grounds*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Gov. of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981).

that have continued to adhere to *McCullough* and the principles articulated in *McCullough*. *See, e.g., Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 720 (1974) ("The Court has refused to apply an intervening change . . . where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional.") (citations omitted.).[7]

Further, the Fifth Circuit's dismissal of *McCullough* violates the principle of *stare decisis*. As the Sixth Circuit noted in *Plaut*, "we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court or on us. . . . *McCullough* remains good law . . . even if the Supreme Court has not ruled on a similar case since." *Plaut*, 1 F.3d at 1493 n.12 (6th Cir. 1993). The Second Circuit, in *Axel Johnson*, reached the same conclusion. 1993 U.S. App. LEXIS 24954, at *15.

7. This Court and the lower courts also have adhered to the *McCullough* principle, without specifically citing the decision. *See Hurtado* v. *California*, 110 U.S. 516, 536 (1884) ("due process of law" excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees"); *Pennsylvania* v. *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1855) (Congress cannot "annul the judgment of the court already rendered or the rights determined thereby"); *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849) ("no legislative act can change the rights and liabilities of parties which have been established by solemn judgment."); *see also American Federation of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989) ("[c]urative government action is not to be given such retroactivity as to demolish intervening vested rights."); *Tonya K. ex rel. Diane K.* v. *Board of Education*, 847 F.2d 1243, 1247-48 (7th Cir. 1988) ("once a court has disposed of a case, Congress may not dictate a different result"); *Taxpayers for Animas La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477 (10th Cir. 1984) (legislature may not interfere with an adjudicated right).

Instead of addressing this precedent, the Fifth Circuit relied upon the decisions in *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947), and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which do *not* involve legislative attempts to overturn final judgments in private actions seeking damages.[8] *Fleming*, *Usery*, and the other cases cited by the Fifth Circuit do not even mention, much less overrule, *McCullough* and its progeny. Indeed, no court, other than the Fifth Circuit, has ever applied *Fleming*[9] or *Usery*[10] to a

8. The other decisions cited by the Fifth Circuit, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855), and *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945), are inapposite for the same reason. To the contrary, *Pennsylvania* and *Chase* reaffirm the rule that private rights that have passed into judgment are immune from retroactive legislation. *See Axel Johnson*, 1993 U.S. App. LEXIS 24954, at *15; *Plaut*, 1 F.3d at 1494-96. *Freeland* v. *Williams*, 131 U.S. 405, 417, 419-21 (1889), involved a statute enacted "after the turmoils of a civil war" which overturned a state court judgment "rendered on account of acts done in pursuance of the powers of a belligerent in time of war."

9. The Fifth Circuit's interpretation of *Fleming* is inconsistent with this Court's opinion in *Federal Housing Admin.* v. *Darlington Mills*, 358 U.S. 84, 90 (1958) (*Fleming* affects "future action") and the Second Circuit's decision in *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (*Fleming* applies to claims that "had not ripened into final judgment"), *cert. denied*, 335 U.S. 887 (1948). *See also Darlington Mills*, 358 U.S. at 93 (Frankfurter, J., dissenting) (*Fleming* did not involve "the complete wiping out of ... vested rights"); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 n.6 (E.D. Mich. 1992); C. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 719 n.146 (1960) (the statute in *Fleming* was "construed as preventing only future evictions ...[not as] depriving a person of a previously acquired judgment.").

10. The Fifth Circuit's reliance on *Usery* is inconsistent with the decisions of several circuits, all of which have applied retroactive statutory changes only in *pending* cases on the strength of *Usery*, or the principle stated therein, but have consistently recognized that retroactive legislation cannot undermine "definite or enforceable property rights ... reduced to final judgment." *See Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *In re TMI Litig. Cases Consolidated II*, 940 F.2d 832, 861 (3d Cir. 1990) (citing *Usery*, but stating that a claim affords no property right "until reduced to final judgment"); *Lunsford* v. *Price*, 885 F.2d 236, 240 n.13 (5th Cir. 1989); *Grimesy* v. *Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (rights do not vest until " 'a final unreviewable judgment' "), *cert. denied*, 111 S. Ct. 1620 (1991); *Canisius College* v. *United States*, 799 F.2d 18, 26 (2d Cir. 1986) (citing *Usery*, but stating that right not protected because plaintiff "has no final judgment establishing such a right"), *cert. denied*, 481 U.S. 1014 (1987); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (Congress can act so long as claims have "not ripened into final judgment."), *cert. denied*, 335 U.S. 887 (1948); *National Railroad Passenger Corp.* v. *State of Nev. Dept. of Conservation and Natural Resources*, 776 F. Supp. 528, 532 (D. Nev. 1991); *Michael Reese Hosp. and Medical Center* v. *United States*, 684 F. Supp. 986, 991 (N.D. Ill. 1988).

case involving a final judgment of an Article III court.

The Fifth Circuit's reliance on Fed. R. Civ. P. 60(b)(6) to justify a legislative attempt to re-open a final judgment also raises important issues worthy of review by this Court. The Sixth Circuit dismissed the same argument, in the context of separation of powers principles, as "irresponsible," explaining that the "Court's authority [in Rule 60(b)] to set aside its own final judgment ... is profoundly different from a legislative decree requiring courts to set aside final judgments." *Plaut*, 1 F.3d at 1494 n.13. A contrary holding would mean that there are no "final" judgments and thus "there are no 'rights' of any kind and every decision ... is forever malleable. We doubt that the Supreme Court would take this view unless it is willing to overrule *Hodges*, *O'Grady*, and *Wheeling & Belmont Bridge* and jettison the [vested rights] doctrine." *Tonya K. ex rel. Diane K.* v. *Board of Education*, 847 F.2d 1243, 1248 (7th Cir. 1988).

Finally, the Fifth Circuit's suggestion that vested property rights may be divested if the legislature has "acted rationally toward the party asserting a due process violation," 997 F.2d at 50; App. at A-24, clearly misreads the decisions of this Court. Insofar as vested rights are concerned, a rational relationship standard is simply inapplicable. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the Constitution "prohibits (or

requires compensation for) all retroactive laws that destroy vested rights''); *Bradley*, 416 U.S. at 720 (''intervening change[s]'' may not infringe upon ''matured'' or ''unconditional'' rights). Moreover, the decisions cited by the Fifth Circuit for this novel proposition involved legislative programs that altered unvested economic rights or obligations and that did not attempt to overturn final judgments involving private litigants. *See United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Usery*, 428 U.S. at 18; *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 516 (1938).

This Court should grant the Petition to consider the important constitutional due process issues raised by the Fifth Circuit's opinion, including the continued vitality of the Court's decision in *McCullough* v. *Virginia*, and the rule that private rights that have passed into final judgment are immune from retroactive legislation.

CONCLUSION

A writ should be issued to address the fundamental separation of powers and due process questions posed by this case.

Dated: New York, New York
October 18, 1993

Respectfully submitted,

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201
(214) 855-3000

Attorneys for Petitioner
Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017
(212) 773-3800

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5000

Attorneys for Petitioner
Ernst & Young

* *Counsel of Record*

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202
(214) 761-2800

Attorneys for Petitioner
Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149
(212) 371-9200

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000

Attorneys for Petitioner
Salomon Brothers Inc

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3375

TGX CORP.

Plaintiff,

versus

GLORIA ANNETTE TURNER SIMMONS, ET AL.,

Defendants-Appellants
Cross-Appellees,

versus

GREENWICH INSURANCE COMPANY, ET AL.,

Defendants-Appellants
Cross-Appellees,

* * * * *

GAYLON D. SIMMONS, ET AL.,

Defendants-Appellants
Cross-Appellees,

versus

J.C. TEMPLETON, ET AL.,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court for the
Eastern District of Louisiana

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* * * * *

No. 92-1662

PACIFIC MUTUAL LIFE INSURANCE CO.

Plaintiff-Appellant,

versus

FIRST REPUBLICBANK CORP., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

BEFORE: POLITZ, *Chief Judge*, REAVLEY and BARKSDALE, *Circuit Judges*.

REAVLEY, *Circuit Judge*:

Plaintiffs who suffered dismissals in two separate securities-fraud cases asked the district courts to reinstate their claims under § 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which Congress enacted in November 1991. The district courts denied these motions after holding that § 27A(b) violates the Constitution by disturbing final judgments and invading judicial authority. We conclude that the legislation is constitutional and we reinstate the plaintiffs' suits.

I. BACKGROUND

A. PACIFIC MUTUAL LIFE INS. CO. v. FIRST REPUBLICBANK CORP., ET AL.

In March 1991, Pacific Mutual Life Insurance Company (PMLI) sued investment bankers and accountants (collectively PMLI Defendants)[1] for securities fraud under § 10(b) of the 1934 Securities Exchange Act (1934 Act), 15 U.S.C. § 78j(b). PMLI's claims arise from the June 1987 merger of InterFirst Corporation and RepublicBank Corporation, PMLI's purchase of InterFirst securities in July and September 1987 for approximately $8 million, and the PMLI Defendants' facilitation of those transactions.

From long before PMLI purchased the securities to the time after PMLI filed its suit, this court determined the statute of limitations for implied private actions under § 10(b) according to analogous state law. When PMLI filed its suit in the United States District Court for the Northern District of Texas, our precedent recognized that the four-year limitations period applicable to fraud actions in Texas also governs § 10(b) actions filed there. *In re Sioux, Ltd., Sec. Litig.* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). For that reason, although the PMLI Defendants filed dispositive motions under FED. R. CIV. P. 9(b) and 12(b)(6), they did not contest the timeliness of PMLI's suit.

While these motions awaited the district court's consideration, the Supreme Court issued *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf*

1. The PMLI Defendants are Morgan Stanley & Co., Goldman Sachs & Co., Ernst & Young & Co., and Salomon Brothers Inc.

implicitly overrules *Sioux, Ltd.* and many similar cases in other circuits with its holding that the Securities Exchange Act as written in 1934, not state law, establishes the limitations period for § 10(b) suits. *Id.* at 2780. The Court read the Securities Exchange Act of 1934 to establish a uniform rule that "[l]itigation instituted pursuant to § 10(b) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 2782 (1-and-3 rule).

On the same day that the Court rendered *Lampf*, it decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). A plurality of the *Beam* Court held that Georgia's Supreme Court erred by "refus[ing] to apply a rule of federal law retroactively after the case announcing the rule has already done so." *Id.* at 2446. *Beam* teaches that "when th[is] Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 2448.

Because the *Lampf* Court applied the 1-and-3 rule to eliminate Gilbertson's § 10(b) claim, *Beam* required courts to apply the limitation rule announced in *Lampf* to pending claims under § 10(b). The PMLI Defendants promptly brought *Lampf* and *Beam* to the district court's attention, and the court dismissed PMLI's § 10(b) claims with prejudice in August 1991. The district court based its dismissal on the fact that "the face of [PMLI's complaint establishes] that this action was filed more than three years after the alleged misrepresentations or omissions upon which [PMLI's] claim rests." Recognizing no way around *Lampf* and *Beam*, PMLI did not appeal.

Three months later, however, Congress provided a way around *Lampf* and *Beam* by passing § 27A, which provides:

> *(a) Effect on Pending Causes of Action.*— The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> *(b) Effect on Dismissed Causes of Action.*— Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after [December 19, 1991].

1934 Act, § 27A (amended by P.L. 102-242 (December 19, 1991)), *codified at* 15 U.S.C. § 78aa-1. On January 31, 1992, PMLI filed a motion to reinstate pursuant to § 27A(b). The PMLI Defendants challenged the constitutionality of § 27A(b), and the district court admitted the United States as an intervenor to explain why § 27A is constitutional. After considering the parties' written submissions, the district court held: 1) § 27A(b) contravenes due process by divesting the PMLI Defendants of their final judgment; and 2) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. PMLI appeals from the district court's denial of its motion to reinstate.

B. SIMMONS, ET AL. v. TGX CORP., ET AL.

In 1987, TGX Corporation sued Gaylon Simmons[2] over a $21 million stock purchase contract which the parties executed in November 1986, and Simmons filed a counterclaim against TGX under § 10(b). TGX filed for bankruptcy protection in 1990, staying the counterclaim. Simmons then filed a separate § 10(b) suit in March 1990 against attorneys, accountants, and directors (collectively TGX Defendants)[3] who facilitated the stock purchase.

Simmons sued the TGX Defendants in the United States District Court for the Eastern District of Louisiana.[4] The parties disputed whether Simmons met Louisiana's two-year prescriptive period for securities fraud, which this court has held applicable to § 10(b) claims. *Jensen* v. *Stellings*, 841 F.2d 600, 606 (5th Cir. 1988). The Supreme Court rendered *Lampf* and *Beam* before the district court ruled on the parties' limitation dispute.

The TGX Defendants informed the district court that Simmons sued them in March 1990, and his complaint alleges November 1986 misdeeds. They argued that these facts entitled them to dismissal under *Lampf's* 1-and-3 rule. Simmons did not dispute the effect of *Lampf*, and the district court

2. Gloria Simmons joins Gaylon Simmons as a party to this dispute.

3. The TGX Defendants are J.C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W.A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Co., and William M. Templeton. Simmons amended his complaint to add Greenwich and W.M. Templeton as defendants in May 1991.

4. The court consolidated this suit with the suit between TGX Corporation and Simmons.

directed the TGX Defendants to draft a judgment and order. That document recited:

> all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and [the court finds that] final judgment should be entered . . .
>
> [P]laintiffs' claims . . . under . . . the Securities Exchange Act of 1934 are hereby dismissed with prejudice.

Simmons asked the district court to delete "with prejudice" from the judgment to avoid any preclusive effect, and the court obliged before signing it in August 1991. Simmons did not appeal this judgment.

Simmons sought the deletion from the August 1991 judgment because he thought that he could avoid *Lampf* by adding the TGX Defendants as parties to the 1987 counterclaim against TGX, and he did not want the dismissal in the March 1990 suit to preclude him from doing so. Simmons's idea ultimately proved unsuccessful,[5] and the district court entered another judgment dismissing Simmons's § 10(b) claims against the TGX Defendants in October 1991. Simmons did not appeal this October 1991 judgment.

5. A magistrate permitted Simmons to amend his 1987 counterclaim for purposes of procedure only, but the district court held that the additional claims did not relate back to the 1987 claims, so those claims were still untimely. In its September 1991 minute entry explaining why Simmons's § 10(b) claims were still untimely, the district court stated that the August 1991 judgment did not preclude the amendment to the 1987 counterclaim because the court entered the August 1991 judgment without prejudice.

With renewed hope from § 27A(b), Simmons filed a Motion to Reinstate the March 1990 suit in January 1992. The parties disputed both the applicability and constitutionality of § 27A(b). In March 1992, the district court held: 1) the court dismissed Simmons's March 1990 § 10(b) suit "as time barred" within the meaning of § 27A(b) despite the fact that the court dismissed the suit without prejudice in August 1991; and 2) Simmons timely filed his § 10(b) claims under Louisiana's two-year prescription period and *Jensen*; but 3) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. *TGX Corp.* v. *Simmons*, 786 F. Supp. 587 (E.D. La 1992).

In April 1992, Simmons asked for a new trial on his reinstatement motion. In May 1992, the district court denied Simmons's motion for a new trial after holding that, in addition to *Beam's* implications, § 27A(b) violates due process principles by upsetting final judgments. Simmons appeals from the district court's denials of his motion to reinstate and his new-trial motion. The TGX Defendants cross-appeal the district court's ruling that Simmons's March 1990 suit falls within the scope of § 27A(b) even though the district court dismissed that suit without prejudice in August 1991. The United States intervenes to defend the constitutionality of § 27A(b).

II. ANALYSIS

Simmons and *PMLI* ultimately raise the same novel constitutional questions, so we decide both appeals in this opinion. We review the district courts' decisions concerning the meaning and constitutionality of § 27A(b) *de novo*. *Moulton* v. *City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We proceed without the benefit of prior appellate attention to § 27A(b).

A. WHETHER A CONSTITUTIONAL SECTION 27A(b) HELPS SIMMONS

The TGX Defendants argue that § 27A(b) does not afford Simmons any relief even if it is constitutional, because Simmons asked the district court to dismiss his March 1990 claims under § 10(b) without prejudice. But all of their arguments require an inaccurate reading of § 27A(b).

Congress wrote § 27A(b) to prevent courts from applying *Lampf* to cases that plaintiffs filed before the Court rendered *Lampf*. Section 27A(b) states a specific procedure (motion for reinstatement within 60 days of enactment) to restart "[a]ny" § 10(b) claim "commenced on or before June 19, 1991 . . . which was dismissed as time barred" after *Lampf*, but "would have been timely filed" before *Lampf*.

What little legislative history exists for § 27A confirms that Congress intended to obliterate *Lampf* and *Beam* for all cases filed before the Court rendered *Lampf*.[6] *See, e.g.*, 137 CONG. REC. S17382 (daily ed. Nov. 21, 1992) (Sen. Riegle, § 27A sponsor) ("The language of the bill is designed to return plaintiffs and defendants to exactly the position that they had on June 19, 1991," the day before the Court rendered *Lampf*.); *id.* at H11813 (daily ed. Nov. 26, 1991) (Rep. Markey) ("The language . . . unambiguously reverses the *Lampf* ruling's application of the 1-year and 3-year statute of limitations. . ."). The Supreme Court itself has recognized as much. *See Musick, Peeler & Garret* v. *Employers Ins. of Wausau*, 1993 WL 179262 at *5 ("Congress . . . limit[ed] the

6. For a comprehensive treatment of the legislative history of § 27A, see Anthony Michael Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 27-30 (1992).

retroactive effect of [*Lampf* by directing] the applicable 'limitation period for any private civil action implied under [§ 10(b)] that was commenced on or before June 19, 1991. . .'''); *id.* at *11 (Thomas, J., dissenting) (Congress ''alter[ed] the retroactive effect of the 10b-5 limitations period that we adopted in *Lampf*.''). We know of no evidence or reason that supports a narrower reading of § 27A. *Compare Herman & McLean* v. *Huddleston*, 103 S. Ct. 683, 689 (1983) (interpreting securities laws to ''further[] their broad remedial purposes'').

1. Time-Bar Dismissal

The TGX Defendants seize on the district court's statement that Simmons did not voluntarily dismiss his § 10(b) claims under FED. R. CIV. P. 41 by asking the court to dismiss those claims without prejudice in August 1991. *Simmons*, 786 F. Supp at 590. They argue that the court's statement is erroneous, and once we recognize that Simmons voluntarily dismissed his claims, we must hold that the claims were not ''dismissed as time barred'' under § 27A(b)(1).

But even if Simmons chose to dismiss his § 10(b) claims, the record conclusively establishes that he did so because *Lampf* rendered those claims time barred. The district court's August 1991 judgment states this very fact. We interpret ''dismissed as time barred'' in § 27A(b) to include all cases that were dismissed because of *Lampf's* time bar. Simmons satisfies this but-for scrutiny.

2. Nullification

The TGX Defendants have found language in our cases in which this court states that the effect of a voluntary dismissal is to ''put the plaintiff in the same legal position in which he would have been had he never brought the first suit.'' *Taylor* v. *Bunge Corp.*, 775 F2d 617, 619 (5th Cir. 1985). They

would have us apply this language, irrespective of the reasons for and context in which we used it, to hold that Simmons's suit vanished upon voluntary dismissal, leaving nothing to reinstate by operation of § 27A(b).

But there is no rule that makes all voluntarily dismissed cases absolutely null for all purposes. This court has permitted a district court to resurrect a voluntarily dismissed case under FED. R. CIV. P. 60. *Boehm* v. *Office of Alien Property*, 344 F.2d 194 (5th Cir. 1965). And even if there were an absolute-nullity rule, we could not apply it in the face of contrary congressional intent unless we could articulate a constitutional basis for doing so. As we have explained, Congress intended broad relief from *Lampf* for any § 10(b) claim ''that was commenced on or before June 19, 1991.'' Simmons commenced his § 10(b) claims against the TGX Defendants on March 8, 1990, which places those claims within the ambit of § 27A(b).

3. Avoidance

The TGX Defendants cite cases holding that courts should refrain from deciding constitutional questions if possible. *See, e.g., Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 819 (D.C. Cir. 1974) (''[W]hen one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of a contrary legislative intent.''). They accompany these cites with creative readings of § 27A(b) that would avoid constitutional questions, while conveniently killing Simmons's claims.[7] None of their

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7. For example, the TGX Defendants suggest that Congress really accomplished nothing whatsoever in § 27A because the ''laws applicable . . . as such laws existed on June 19, 1991,'' which § 27A directs courts to apply, are defined by the Securities Exchange Act of 1934, just as *Lampf* holds. They also suggest that § 27A only replaces the one-year limitations period

readings respects Congress' unmistakable intent to keep *Lampf* from operating retroactively in cases that were dismissed as time barred.[8] We will not ignore the obvious meaning of § 27A simply to avoid the constitutional questions that Congress has created.

4. Claim Preclusion

Finally, the TGX Defendants point to the district court's October 1991 dismissal of Simmons's amended counterclaim in the TGX suit. They argue that the court dismissed this amended counterclaim with prejudice, and the amended counterclaim raised the same claims that Simmons pursues through his January 1992 reinstatement motion under § 27A(b), so claim preclusion bars any reinstatement of Simmons's March 1990 claims regardless of § 27A(b).

But the TGX Defendants have waived any claim-preclusion argument by failing to raise it in the district court. Our thorough search of the record reveals no mention of claim preclusion by the court's October 1991 judgment, and we refuse to consider it for the first time on appeal. *See Russell* v. *SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th

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discussed in *Lampf*, and does not affect *Lampf's* direction that § 10(b) actions be further limited by a three-year statute of repose.

The PMLI Defendants suggest that Congress only meant § 27A(b) to reinstate actions that were dismissed from a district court, but still pending on appeal at the time a party files a motion for reinstatement.

8. *Cf. Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 809 (11th Cir. 1988) (Though Congress intended a statute to control cases "pending" before enactment of the statute, the court found no clear intent that the statute would apply to pending cases that a court had also finally dismissed.).

Cir. 1992) (failure to present res judicata argument to district court usually prevents appellate court from addressing the issue); *see also Aluminum Prod. Distrib., Inc.* v. *Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1384 (10th Cir. 1977) (where a party asserted res judicata for the first time in a new-trial motion, "the district court was not bound by any [prior] judgment," and the appellate court refused to consider any preclusive effect on appeal).

We come to the central question of both cases: the constitutionality of § 27A(b).

B. WHETHER THE CONSTITUTION PROTECTS INDIVIDUALS OR THE JUDICIARY FROM § 27A(B)

Congress' authority to establish limitations periods for securities-fraud claims cannot be disputed. *See Musick*, 1993 WL 179262 at *4-*5. Section 27A(b) is controversial exclusively for its retroactivity.[9] While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. CONST. art. I, § 9; *Mahler* v. *Eby*, 44 S. Ct. 283, 286 (1924).

The PMLI Defendants and TGX Defendants (collectively Defendants) argue that the Supreme Court's precedent and the structure of the Constitution establish that § 27A(b) unconstitutionally affects individuals and the federal judiciary. The district courts agreed with them. We do not.

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9. A retroactive statute "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (hereinafter *Constitutionality of Retroactive Legislation*).

1. Individual Rights

The Constitution's Fifth Amendment prohibits Congress from depriving any person of property without due process of law. The Defendants claim that § 27A(b) contravenes the Fifth Amendment by compromising two of their property rights as recognized by the Supreme Court.

a. The Right to a Final, Nonappealable Judgment

Each of the defendants in these cases (collectively Defendants) possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims. Unlike § 27A(a), § 27A(b) effectively nullifies these judgments, so the cases addressing the constitutionality of § 27A(a) have nothing to say about whether § 27A(b) unconstitutionally abrogates any right to a final judgment.[10] For guidance on this question, we turn to the Supreme Court.

The Defendants rely upon *McCullough* v. *Virginia*, 19 S. Ct. 134 (1898) and its progeny to argue that § 27A(b) cannot constitutionally take away their judgments. McCullough obtained a judgment against Virginia in 1892, but a Virginia appellate court reversed that judgment. *Id.* at 135. Between the time of judgment and its reversal, Virginia's legislature repealed the statute that authorized McCullough's suit. When

10. The only appellate courts to rule on the constitutionality of § 27A to date have upheld it as a means of changing the limitations period in *pending* § 10(b) cases. *Cooke* v. *Manufactured Homes, Inc.*, 1993 WL 248257, at *8 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 1993 WL 156464, at *3 & n.11 (1st Cir. May 19, 1993); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray*, 989 F.2d at 1574; *Anixter* v. *Home-State Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir. 1992); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1570 (11th Cir. 1992).

the Supreme Court agreed to hear McCullough's appeal, Virginia asked the Court to apply the new law repealing authorization for the suit and dismiss McCullough's appeal. *Id.* at 142. The Court emphatically refused Virginia's request:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id.[11]

Our research indicates that the Court has never applied this holding in *McCullough* to decide another case. Moreover, both before and after *McCullough*, the Court has decided cases with identical relevant facts according to a different rule.[12] Accordingly, we must carefully scrutinize

11. Before *McCullough*, the Court did not adhere to such an absolute rule. *See Freeland* v. *Williams*, 9 S. Ct 763, 767-68 (1889) (sustaining a state law which invalidated a final judgment for damages in a trespass action); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855) (accepting "*as a general proposition* . . . especially as it respects adjudication upon the private rights of parties," that legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff") (emphasis added).

12. In *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801, Chief Justice Marshall explained:

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110. Almost two hundred years later, *Schooner Peggy* remains good law. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570,

McCullough's rationale in assessing the precedential value of its broad statement concerning rights vested by judgment.

The *McCullough* Court did not explicitly ground its holding in the Constitution. In subsequent decisions, however, the Court explained that the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments, including the one that belonged to McCullough. *E.g.*, *Hodges* v. *Snyder*, 43 S. Ct. 435, 436 (1923). Thus, we decide this case according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation. The Defendants stress a "vested rights" theory exemplified by *McCullough*, but we find talk of vested rights to merely state due process conclusions, and thus unnecessarily confusing. The court explains:

1581-82 (1990) (Scalia, J., concurring) (reciting history of the Court's adherence to *Schooner Peggy* while advocating a rule requiring a clear manifestation of legislative intent before courts will recognize retroactive legislation); *see also Griffith* v. *Kentucky*, 107 S. Ct. 708, 712 n.6 (judgment is final for purposes of the constitutional prohibition on retroactive criminal legislation only when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). But in *McCullough*, the Court ignored *Schooner Peggy* and the fact that McCullough's case was pending on appeal when Virginia's legislature changed the law, deciding instead that the law applicable to a case "freezes" at the time the trial court renders its judgment. 19 S. Ct. at 142 ("The writ of error to the court of appeals of [Virginia] brought the validity of [the trial court's] judgment into review, and the question presented to that court was whether, *at the time it was rendered*, it was rightful or not.") (emphasis added). The *McCullough* Court may have understood *Schooner Peggy* to apply only to Article III courts, and ignored it for this reason.

> the words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. *Holt*, 6 S. Ct. 209, 213 (1885). A seminal treatise recognizes what has happened when courts have departed from the Constitution in search of an amorphous "vested rights" theory:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."

NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.05, at 364-65 (C. Sands 4th ed. 1986); *accord Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. at 696. We waste no further time with the "vested rights" language, and turn to due process.

When the Court rendered *McCullough*, it may have held the absolutist view, indicated by the statement quoted above, that the Due Process Clause protects all final judgments from retroactive legislation. But the Court has retreated from this view. The Court permits retroactive legislation to annul private judgments that affect public rights, *Hodges*, 43 S. Ct. at 436, or private injunctions upon changed circumstances.

System Federation No. 91, Ry. Employees' Dept., AFL-CIO v. *Wright*, 81 S. Ct. 368, 371 (1961) (modifying a permanent injunction to conform with subsequently-enacted amendments to the Railway Labor Act). The dispositive retreats from any absolute *McCullough* rule, however, come in *Fleming* v. *Rhodes*, 67 S. Ct. 1140 (1947) and *Usery* v. *Turner Elkhorn Mining Co.*, 96 S. Ct. 2882 (1976).

In *Fleming*, landlords obtained valid final judgments from a Texas court entitling them to evict certain tenants upon the lapse of wartime price regulations. Congress cured the lapse within two months, and included a law which prohibited the eviction of the tenants with its extension of price regulations. 67 S. Ct. at 1141 n.3. A price-control administrator asked a federal district court to apply this law to enjoin the landlords and state officials from executing their judgments, but the district court held that the federal statute violated the Fifth Amendment's Due Process Clause. *Id.* at 1141-42. The Supreme Court reversed, explaining that

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." *The rights acquired by judgments have no different standing*. The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the [administrator] notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Id. at 1144 (footnotes omitted and emphasis added), *cited with approval in Federal Housing Admin.* v. *Darlington, Inc.*, 79 S. Ct. 141, 146 & n.6 ("[A]ny 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.").

Usery arose from Congress' efforts to provide compensation to coal miners and their survivors. The disputed legislation establishes an administrative procedure under which victims of the disease known as "black lung" and their survivors may collect benefits from coal companies, mandates certain presumptions against the coal companies, and operates retroactively. 96 S. Ct. at 2889-90. The companies argued that the statute unconstitutionally deprived them of their property because it imposed upon them "an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." *Id.* at 2892. The Court responded:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . .
>
> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming* v. *Rhodes* . . . .

Id. at 2892-93 (citations and footnotes omitted). The Court then assessed the practical consequences of the Act's retrospective imposition of liability and concluded that this

imposition "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . ." *Id.* at 2893.

The Defendants would have us distinguish *Fleming* and *Usery* on the ground that the Court in neither case permitted a retroactive statute to upset a final, nonappealable judgment; they maintain that the rights created by judgments are sacrosanct above other due process rights, and that the *McCullough* rule endures for judgment-based rights. This argument fails to distinguish *Fleming* or *Usery*.

While the *Fleming* Court noted that the retroactive legislation which it upheld only comprised the landlords' ability to *enforce* their judgment rights as opposed to any compromise of the rights themselves, 67 S. Ct. at 1144, the Court has also recognized (as do we) that the removal of a remedy has the same effect as the removal of a right. *See Chase Sec. Corp.* v. *Donaldson*, 65 S. Ct. 1137, 1142 (1945) ("[I]t is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion."); *Lynch* v. *United States*, 54 S. Ct. 840, 844 (1934) ("Contracts between individuals or corporations are impaired . . . whenever the right to enforce them is taken away or materially lessened.").

Usery teaches that Congress can, under some circumstances, create private civil liability for past acts. We recognize nothing in the *Usery* Court's analysis that would limit Congress from retroactively creating liability for securities fraud if it justified this retroactive effect with reasons comparable to those recited in *Usery*. *See* 96 S. Ct. at 2893-94. Because *Usery* allows Congress to avert questions of judgment rights altogether, there is no due process reason why Congress cannot reach the same result by upsetting a judgment.

Moreover, FED. R. CIV. P. 60(b) itself destroys the Defendants' position that final, nonappealable judgments confer sacrosanct due-process rights on individuals. Rule 60(b) permits courts to "relieve a party . . . from a final judgment . . . for . . . any . . . reason justifying relief from the operation of the judgment." The Court has repeatedly

acknowledged that Rule 60 "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg* v. *Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988) (citation omitted). The Tenth Circuit is especially likely to disturb final judgments under Rule 60(b) upon subsequent changes in the law: "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)." *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989).

Rule 60(b) has spawned an extensive jurisprudence; no doubt remains as to its constitutionality. And we know of nothing to indicate that an individual holds any greater constitutional right against one branch of government than she holds against another. This reasoning establishes that, despite *McCullough*, judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation.

It is not our place to state general rules as to when the Due Process Clause permits Congress to disturb judgments. We limit our inquiry to the facts before us. Fortunately, the Court provides ample guidance in *Donaldson*. *See* 65 S. Ct. at 1141-43.

Donaldson sued a securities broker under Minnesota statutory and common-law fraud theories. A state judge ruled that the broker violated the Minnesota securities statute and that Donaldson timely filed his claim because his absence from the state tolled Minnesota's limitations period. Minnesota's Supreme Court held the latter ruling erroneous, and remanded for further proceedings. *Id.* at 1138. Meanwhile, Minnesota's legislature enacted a limitations statute which permitted any securities fraud claim to be brought within one year of the statute if the securities were delivered more than five years before the statute's enactment date. Donaldson met the five year delivery requirement and availed himself of the new statute in Minnesota's courts. *Id.* at 1139. The broker appealed to the Supreme Court, arguing that Minnesota deprived him of due process by applying the new limitations

period to him. We quote extensively from the Court's unanimous refutation of this argument because we find it applicable here:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witness have died or disappeared, and evidence has been lost. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
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> . . . .
>
> . . . . The Fourteenth Amendment [Due Process Clause] does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows

> that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication.

Id. at 1142-43 (citations and footnotes omitted).

The Defendants understandably stress the last phrase of the quoted passage, and observe that while *Donaldson* permits a legislature to retroactively change limitations periods, it says nothing about whether a legislature can divest a party of a final judgment. The problem with this argument is that *Donaldson* predates both *Fleming* and *Usery*, which we understand to establish that Congress may upset final judgments under some circumstances. To decide whether § 27A(b) can constitutionally upset final judgments, we observe that the Court in *Donaldson, Fleming* and *Usery* invariably considered *whether the legislature acted rationally toward the party asserting a due process violation* to determine whether retroactive legislation deprived those parties of rights without due process.[13]

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13. Even before *Usery*, one commentator comprehensively surveyed the Court's decisions concerning the constitutionality of retroactive legislation, and concluded that three inquiries, none of them dispositive, inform the Court's rationality decisions: 1) the nature of the public interest served by the retroactive enactment; 2) the extent of the abrogation of the preenactment right; and 3) the nature of the right affected by a retroactive statute. Constitutionality of Retroactive Legislation, 73 HARV. L. REV. at 697, 711, 717. He considers a statute that retroactively upsets final judgments primarily under the third criteria, and explains:

> the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remem-

In *Fleming*, the Court understood the landlords asserting due process rights to have taken advantage of an inadvertent two-month lapse in price-control regulation to defense-area housing during wartime, and held that Congress could rationally exercise its commerce authority to deny them this advantage. 67 S. Ct. at 1143-44. In *Usery*, the Court analyzed the effect of the retroactive legislation on the coal companies to determine whether the legislation "me[t] the test of due process" and concluded that the legislation was "justified as a rational measure to spread the costs of the employees' disabilities." 96 S. Ct. at 2893. Likewise, as we quote above, the *Donaldson* Court carefully considered the effect of the retroactive limitations statute on the broker before holding that Minnesota's legislature worked no injustice. 65 S. Ct. at 1143. And recently, the Court upheld a statute that retroactively assessed a fee for use of the Iran-United States Claims Tribunal against a due process challenge by applying this standard: "the test of due process" for "[t]he retroactive aspects of legislation" is met if "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (quoting *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 104 S. Ct. 2709, 2718 (1984)).

Donaldson frees us from speculating as to the bounds of due-process rationality when a legislature promulgates retroactive laws. Like the statute at issue in *Donaldson*, § 27A(b) restores a remedy that PMLI and Simmons lost

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bered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application. Such a case was *Fleming* v. *Rhodes* . . .

Id. at 718-19.

through lapse of time. Like the fraud-based cause of action at issue in *Donaldson*, the Defendants' conduct would not have been different if they would have foreseen § 27A(b). Like the effect of the retroactive legislation at issue in *Donaldson*, § 27A(b) subjects the Defendants to a lawsuit.

As a matter of practical effect on the parties, § 27A(b) differs from the *Donaldson* legislation in one important respect. The *Donaldson Court* characterized the broker's expectation that the limitation law would remain as it was when suit was filed as a "legitimate hope[]," yet held this expectation insufficient to render Minnesota's retroactive limitations statute violative of due process. *Id.* Section 27A(b) represents Congress' complementary view that courts should honor the expectations of plaintiffs and defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*. Section 27A(b) fulfills the hopes that the *Donaldson* Court found legitimate, and is thus a stronger candidate for retroactivity than the statute upheld by the Court; strong enough, we hold,[14] to upset the Defendants' final, nonappealable judgments.

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14. By this statement, we recognize that § 27A(b) should survive any heightened scrutiny required for retroactive legislation that upsets a judgment. We do not imply that retroactive legislation necessarily receives heightened scrutiny if it upsets a final judgment. A judgment for money is a species of property right, and we see no reason why the Constitution accords any more protection to an individual's right to her money when this right is represented by a judgment than when this right is represented by a savings passbook. *See Tonya K. by Diane K.* v. *Board of Educ. of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."). The Supreme Court, this court, and others have consistently permitted legislatures to retroactively affect individuals' rights to money by applying a rationality standard. *See Sperry*, 110 S. Ct. at 396-97; *Pension Benefit Guar. Corp.*, 104 S. Ct. at 2718; *Usery*, 96 S. Ct. at 2893; *Wright* v. *Union Central Life Ins. Co.*, 58 S. Ct. 1025, 1031-34 (1938); *Hoffman* v. *City of Warwick*, 909 F.2d 608, 618-19 (1st Cir. 1990); *Fust* v. *Arnar-Stone Lab., Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984); *DiPippa* v. *United States*, 687 F.2d 14, 19 (3d Cir. 1982).

b. The Right to a Statute of Repose

The Defendants argue that even if Congress can legitimately upset their judgments with § 27A(b), the statute still contravenes due process because it creates civil liability for past acts. Their argument rests on *William Danzer & Co.* v. *Gulf & S.I.R.R.*, 45 S. Ct. 612 (1925), where the Court distinguishes between time-bar statutes that bar the *remedy* of suit in court, and those that extinguish the *liability* altogether. *Id.* at 613; *see also Donaldson*, 65 S. Ct. 1141 n.8 (distinguishing *Danzer* according to its remedy/liability dichotomy). If a time-bar statute extinguishes liability, the *Danzer* Court held that a legislature cannot constitutionally amend such a statute to revive liability once extinguished. 45 S. Ct. at 613. To do so would "retroactively . . . create liability" and thus "deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

The Defendants point to the *Lampf* Court's distinction between a one-year statute of limitation and a three-year statute of repose, and its holding that Congress effectively created this time-bar structure in 1934. *See* 111 S. Ct. at 2780. They observe that, like the statute at issue in *Danzer*, the three-year repose period recognized by the *Lampf* Court is an absolute bar not subject to equitable tolling. *Compare id.* at 2782 *with Danzer*, 45 S. Ct. at 613. From this, they reason that Congress in 1934 enacted an absolute three-year limit on *liability* for § 10(b) violations. Because § 27A(b) operates in these cases to lift this three-year outside limit, the Defendants argue that the statute "retroactively . . . creates liability" in contravention of due process according to *Danzer*.

As a preliminary matter, we note that the *Usery* Court squarely held that Congress may retroactively create liability for past acts, and thus compromises *Danzer's* holding that such legislation *per se* contravenes due process. *See Usery*, 96 S. Ct. at 2893 (legislation is not unlawful solely because "the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted). The Court has also questioned the continued validity of a dichotomy between remedy and right, at least where extinction of the

remedy has the same effect as extinction of the right. *See Donaldson*, 65 S. Ct. at 1142; *see also Lynch*, 54 S. Ct. at 844. And the last time a party asked the Court to apply *Danzer*, the Court did not even make a determination as to whether the time-bar statute at issue affected remedy or liability. *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 97 S. Ct. 441, 450-51 (1976).

But even if *Danzer* remains good law, it does not help the Defendants. *Danzer* and its progeny are inapposite to statutes that bar remedies, while leaving liability intact. We need look no further than *Lampf* to determine whether the three-year statute of repose asserted by the Defendants bars liability.

The *Lampf* Court strove for crystal clarity in stating its holding: "[T]he governing standard for an action under § 10(b) [is] the language of § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e)." 111 S. Ct. at 2782 n.9. Section 9(e), as passed by Congress in 1934, provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

This language unequivocally bars an action to enforce a liability, and says nothing about the continued existence of that liability. Nowhere does the *Lampf* Court even imply that the absolute three-year statute of repose extinguishes liability under § 10(b). We hold that it does not.

This holding conflicts with the Tenth Circuit's holding in *Anixter* v. *Home-Stake Production Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991) that § 13 of the 1934 Act limits liability and not remedy. The *Lampf* Court relied upon § 13 to hold that § 9(e) governs § 10(b) limitations periods, yet mentioned nothing about limitation of liability. 111 S. Ct. 2780 & n.7. And like § 9(e), the language of § 13 unequivocally indicates

a limitation of remedy, not of liability.[15] We disagree with the *Anixter* court's opposite conclusion.

The Defendants wrongly assume that a statute of repose must go to liability rather than remedy. *See City of El Paso* v. *Simmons*, 85 S. Ct. 577, 582 n.9 ("[T]he statute of repose challenged here is an alteration of remedy rather than obligation."). They are also mistaken that a time-bar statute limits liability merely because a legislature structures it as an absolute bar that is not subject to equitable tolling. In *Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), the court discussed § 13 as follows:

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to say that equitable tolling and related doctrines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.

Id. at 1391 (citations omitted). Rather than assess whether a statute is characterized as one of repose or limitation, or whether it is subject to equitable tolling, the relevant inquiry under *Danzer* is whether the legislature intended liability or remedy to be extinguished by a time bar. *Donaldson*, 65 S. Ct. 1141 n.8. The primary evidence of this intent is, of course, the language of the statute.[16] In this case, we

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15. Section 13 provides:

> In no event shall any such action be brought to enforce a liability created under § 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under § 771(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

16. The Ninth Circuit has distinguished *Danzer* by applying a presumption that time bar statutes "go to matters of remedy only." *Starks* v. *S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982).

understand Congress to have decided in § 9(e) that the three-year time bar goes to remedy only.

Accordingly, the Defendants have failed to establish that § 27A(b) unconstitutionally deprives them of any right.

2. *Judicial Authority*

The Defendants next invite us to strike § 27A(b) as an affront to our Article III authority even if it does not contravene their constitutional rights. Other courts have considered some of the exact arguments made by the Defendants, and we draw on their wisdom before reaching the Defendants' novel contentions.

a. *Beam and Klein*

The Defendants present the same *Beam* argument that the district court describes in *Simmons*, 786 F. Supp. at 592-94, and the Ninth Circuit describes in *Gray*, 989 F.2d at 1571-72. We adopt the Ninth Circuit's analysis rejecting this argument insofar as it explains why any constitutional rule articulated in *Beam* does not limit Congress' powers under Article I. *Id.* at 1572; *accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 277-78. The Defendants also argue that § 27A(b) affects the outcome of cases without changing the law in violation of the rule announced in *United States* v. *Klein*, 80 U.S. 128 (1871). We adopt the analysis of the Eleventh Circuit in *Scientific-Atlanta*, 971 F.2d at 1572, which explains that § 27A respects *Klein* by changing the law. *Accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 278-79; *Gray*, 989 F.2d at 1568-70; *Anixter*, 977 F.2d at 1544-46.

b. Pure Retroactivity

The Defendants also contend that Article I does not confer authority upon Congress to enact purely retroactive legislation. We view such a blanket prohibition as tantamount to a civil Ex Post Facto Clause, something that the Court has explicitly refused to recognize. *See Galvan* v. *Press*, 74 S. Ct. 737, 743 n.4 ("The Court . . . has undeviatingly enforced the

. . . position, first expressed in *Calder* v. *Bull*," that "the *ex post facto* Clause applies only to prosecution for crime. . . . It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.") (citation omitted); *cf. Cummings* v. *Bostwick*, 481 F. Supp. 1251, 1254 & n.6 (D. N.H. 1980) (the constitutions of Colorado, Georgia, Idaho, Missouri, New Hampshire, Ohio, Tennessee and Texas explicitly prohibit all retroactive legislation).

To the contrary, the Court has held that a statute is not unconstitutional merely for its retroactivity. *See Usery*, 96 S. Ct. at 2893; *see also Scientific-Atlanta*, 971 F.2d at 1573 (rejecting argument that § 27A transgresses separation of powers doctrine because it is purely retroactive). The Defendants do not adequately distinguish *Usery* by explaining that the statute at issue in that case had some prospective effect. The *Usery* Court nowhere predicates its blessing of retroactive legislation on an associated prospective component. Indeed, the Court has before upheld purely retroactive legislation against a separation-of-powers challenge. *See United States* v. *Sioux Nation of Indians*, 100 S. Ct. 2716, 2745 (1980). The Constitution imposes no bar on purely retroactive legislation *per se*.

c. Final Judgments

Lastly, the Defendants assert that § 27A(b) unconstitutionally usurps judicial authority by upsetting final judgments.[17] They say that § 27A(b) places Congress in the position of a super-appellate court, exercising review authority over the Supreme Court and its decisions in *Lampf* and *Beam*.

To define the constitutional separation of legislative and judicial authority, the Court focuses upon "the practical

17. The Ninth Circuit pretermitted this question in *Gray*. *See* 989 F.2d at 1571.

effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3257 (1986). Under this standard, we find § 27A(b) harmless.

With § 27A(b), Congress did not overrule decisions of the Supreme Court. As we have held through *Scientific-Atlanta*, Congress changed the law after final judgment in *Lampf* and *Beam*, giving plaintiffs a new right to assert in Court through a reinstatement motion. The Defendants understandably claim a violation of *their* constitutional rights by this action, but § 27A(b) takes no authority from the judiciary. Most significantly, § 27A(b) leaves the final resolution of securities-fraud disputes to the courts — we will decide, indeed are here deciding, which controversies will end in dismissal despite § 27A(b). If we understood a statute's purpose to be the reversal of results in particular controversies between private individuals, we would strike the statute as violative of our authority to decide cases. *See, e.g., United States* v. *O'Grady*, 89 U.S. 641, 648 (1875) (finding that the Treasury Secretary invaded judicial authority by offsetting a court's judgment with claimed, but unlitigated tax liability). But § 27A(b) is innocent on this score.

By upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done. In *Sioux Nation*, the Court held that the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done.

The Sioux Nation brought a Fifth Amendment takings claim against the United States because our government breached a treaty obligation to reserve the Black Hills of South Dakota to the Sioux. The United States Court of Claims dismissed the Sioux Nation's claim for interest on the value of the seized property as barred by res judicata. *United States* v. *Sioux Nation of Indians*, 518 F.2d 1298, 1306 (Ct. Cl. 1975). The Supreme Court denied certiorari. 96 S. Ct.

449 (1975). Three years later, Congress directed the Court of Claims to review the claim's merits without consideration of res judicata. *See* 25 U.S.C. § 70s(b); 100 S. Ct. at 2727. After the Court of Claims ruled in favor of the Sioux Nation, the government appealed, asserting that § 70s(b) violates the constitutional separation of legislative and judicial authority. The Court upheld § 70s(b), permitting Congress to say that a controversy continues after the Court has said that it does not. 100 S. Ct. at 2735-36; *see also Tonya K.*, 847 F.2d at 1247 (citing *Sioux Nation* for the proposition that "Congress may invite a court to reconsider even when it may not dictate the outcome").

Schooner Peggy and its extensive progeny also represent compelling evidence that the Constitution permits Congress and the judiciary to share authority in deciding when a court is finished deciding a particular controversy between individuals. *See* 5 U.S. (1 Cranch) at 110. With the exception of *McCullough*,[18] the Court has repeatedly observed Chief Justice Marshall's admonition that appellate courts must decide cases according to the law that exists when they decide, not the law that existed when the lower court rendered its decision.

In an extreme and stringent application of this rule, the Court rendered *149 Madison Avenue Corp.* v. *Asselta*, 67 S. Ct. 1726, *modifying*, 67 S. Ct. 1178 (1947). The *149 Madison Avenue* Court had affirmed a judgment for overtime pay due plaintiffs. 67 S. Ct. at 1184. But before the time for rehearing had run, Congress retroactively created a defense for the defendants, who asked the Court to reconsider its affirmance in light of the change in law. The Court changed its judgment from an affirmance to a remand so that the district court could consider the case in light of the new law. 67 S. Ct. at 1726. The district court eventually entered judgment for the

18. *See* note 12, *supra*.

defendants. *Asselta* v. *149 Madison Ave. Corp.*, 90 F. Supp. 442 (S.D.N.Y. 1950).

Of course, the rule announced in *Schooner Peggy* does not depend on whether the intervening law helps a particular party. Courts must apply the new law regardless of whether it ends a case that the court otherwise would have remanded for further proceedings. Thus, we interpret *Schooner Peggy* to support the constitutional proposition that Congress and the judiciary share authority to decide when the judiciary's word on a controversy is its last.

The Defendants have articulated no constitutional reason why these controversies should not continue.

III. CONCLUSION

We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

July 20, 1993

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW

No. 92-1662 — *Pacific Mutual* v. *First Republicbank*
No. 92-3375 — TGX Corp. v. *Simmons, et al.*

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that appellees pay to appellants the costs on appeal.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

By:

_____
Deputy Clerk

Enclosure
All counsel of record

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PACIFIC MUTUAL LIFE INSURANCE CO.,	*	
Plaintiff,	*	
v.	*	Civil. No. 3:91-CV-0441-H
FIRST REPUBLICBANK CORPORATION,	*	
IFRB Corporation,	*	
Morgan Stanley and Co., Inc.,	*	
Goldman Sachs & Co.,	*	
Ernst & Young & Co.,and	*	
Salomon Brothers, Inc.,	*	
Defendants.	*	

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion to Reinstate Action and supporting memorandum, filed January 31, 1992; Defendants' Response in Opposition to Plaintiff's Motion, filed February 20, 1992; Plaintiff's Reply Memorandum, filed March 2, 1992; Plantiff's letter to the Court, dated March 5, 1992; Defendant's letter to the Court, dated March 9, 1992; Plaintiff's letter to the Court, dated March 10, 1992; Defendants' letter to the Court, dated April 3, 1992; Plaintiff's letter to the Court, dated April 16, 1992; and Plaintiff's letter to the Court, dated April 29, 1992.

On June 8, 1992, pursuant to 28 U.S.C. § 2403(a), the Court certified its intent to find unconstitutional the Federal

Deposit Insurance Corporation Improvement Act of 1991 (''FDICIA''), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991), and directed the United States to file any pleadings in support of the constitutionality of this statute by July 8, 1992. Accordingly, there is also before the Court the Statement of Interest of the United States and the Securities and Exchange Commission, filed July 6, 1992.

I. Factual Summary

This is a securities fraud case brought by Plaintiff Pacific Mutual Life Insurance Co. (''Pacific Mutual'') on March 1, 1991. The lawsuit arises from Pacific Mutual's purchase in July and September 1987 of Inter-First 12-¾% Notes due October 1, 1989. Pacific Mutual seeks compensatory damages under Section 10(b) of the Securities Exchange Act of 1934 (''Exchange Act''), 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and compensatory and punitive damages for common law fraudulent misrepresentation. Pacific Mutual's claims are based on allegedly false and misleading statements that were made no later than December 1987.

On August 16, 1991 the Court granted Defendants' motions and dismissed with prejudice Plaintiff's federal-law claims as time-barred, and dismissed without prejudice Plaintiff's pendent state-law claims. *See* Memorandum Opinion and Order, dated August 16, 1991 (''MOOP''). The Court's ruling was premised on the Supreme Court decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (June 20, 1991), which established that claims arising under Section 10(b) of the Exchange Act must be governed by a federal statute of limitations. To this end, the Supreme Court selected as the governing standard for an action under Section 10(b) the language of Section 9(e) of the Exchange Act, and concluded that such action must be

commenced within one year after discovery of the facts constituting the violation and within three years after such violation (''1-and-3 year statute of limitations'' or simply the ''*Lampf* rule''). *Id.* at 2782 & n. 9.

Retroactive application of *Lampf* to this case was justified by the fact that the Supreme Court itself had applied the newly articulated statute of limitations in *Lampf* retroactively to the circumstances then pending before it. In a decision issued the same day as *Lampf*, the Supreme Court *required* retroactive application of the 1-and-3 year statute of limitations to Section 10(b) actions, stating,

> [o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship. . . .
>
> . . .
>
> [W]hen the court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.

James B. Beam Distilling Co. v. *Georgia*, __ U.S. __ 111 S. Ct. 2439, 2447-48 (June 20, 1991). Although a plurality opinion, six Justices in *Beam* agreed in the judgment of the Court that once a new rule of law is applied retroactively in one case it must also be applied to all other pending cases involving the same issue. For a detailed discussion of the Justices' positions on this issue, see MOOP at 4-6.

A final judgment has been entered in this case, and it has not been appealed. Pacific Mutual instead has initiated an action in the 192nd District Court of Dallas County asserting its common-law fraud claims.

Congress responded to the Supreme Court's ruling in *Lampf* with passage of the FDICIA which was signed into law by the President on December 19, 1991. FDICIA specifically amended the Exchange Act by adding Section 27(A) which provides in relevant part,

> (b) **EFFECT ON DISMISSED CAUSES OF ACTION.** — Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236. With passage of FDICIA, Congress aimed to remove the retroactive application of *Lampf* and correct "the most adverse effects" of the decision. 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991)(statement of Sen. Bryan). Congress left untouched the prospective application of the *Lampf* rule.

Pacific Mutual now argues that reinstatement of its federal securities claims in this action is warranted, because Section 27(A) requires application of the statute of limitations prevailing in the relevant jurisdiction on June 19, 1991; and that accordingly, the statute of limitations in the Fifth Circuit for Section 10(b) actions at that time was four years. *See Sioux Ltd., Sec. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). Commencement of this action on March 1, 1991 falls within this four year period. Pacific Mutual further

urges this Court to exercise pendent jurisdiction, and reinstate as well its common law fraud claims.

Defendants Ernst & Young, Goldman Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc. (collectively "Defendants") oppose reinstatement on the grounds that Section 27(A) is unconstitutional.

The United States speaks only in support of the constitutionality of Section 27(A).

II. Analysis

There appears to be no dispute that if the terms of Section 27(A) are applied to this case, Pacific Mutual is entitled to reinstatement of its federal securities claims. Consequently, the sole issue before the Court is the constitutionality of Section 27(A). Several district courts have had occasion to consider the constitutionality of Section 27(A).[1] Yet, the diversity of their opinions combined with the fast changing field of jurisprudence surrounding Section 27(A) make the constitutional inquiry before the Court a live and contested one.[2]

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1. It should be noted that some courts have applied Section 27(A) without considering its constitutionality. By way of example, see: *Adams Ass., et al.* v. *JEM Management Ass. Corp., et al.*, 1992 U.S. Dist. LEXIS 1283 (S.D.N.Y. February 7, 1992); *Schick, et al.* v. *Ernst & Young*, 1992 U.S. Dist. LEXIS 221 (S.D.N.Y. January 13, 1992); *Ahmed, et al.* v. *Trupin, et al.*, 1992 U.S. Dist. LEXIS 207 (S.D.N.Y. January 10, 1992); *Ades, et al* v. *Deloitte & Touche, et al.*, 1992 U.S. Dist. LEXIS 12 (S.D.N.Y. January 3, 1992).

The United States also has cited to a circuit court case which has upheld the constitutionality of Section 27(a), purely in the form of dicta and absent any substantive discussion. *See Litton Industries, Inc.* v. *Lehman Brothers Kuhn Loeb Inc.*, Nos. 464, 589, 91-7643, 91-7697, 1992 WL 135101, at *8 n.6 (2nd Cir. June 17, 1992).

2. The Court is aware of the two decisions in the Northern District of Texas which have involved application of Section 27(A). *See Southwest Realty, Ltd.* v. *Daseke, et al.*, No. CA3-89-3055-D, slip op. at 29 (N.D.

A particularly apt predicate to the Court's analysis in this case is the fundamental principle that a statute approved by both Houses of the Congress and signed by the President should be invalidated only "for the most compelling constitutional reasons," *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986), after having resorted to every reasonable construction capable of saving the statute from constitutional infirmity, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). Courts, however, cannot sustain a congressional enactment that contravenes established constitutional principles. *Id.*

Defendants challenge the constitutionality of Section 27(A) on two grounds. First, Defendants argue that Section 27(A) improperly prescribes a limitation period for the select group of Section 10(b) securities cases filed on or before June 19, 1991 without changing the underlying law, and thus it violates the separation of powers doctrine. Second, Defendants argue that Section 27(A) improperly invades the province of the judiciary by requiring Article III courts to reinstate dismissed actions, and thus eviscerate the principle of finality.

The Court is in agreement that Section 27(A) is unconstitutional for it violates established separation of powers principles, but not for the reasons articulated in Defendants' first argument. As discussed below, Section 27(A) in fact does effectuate a change in the law, and thus does not entail outcome determinative direction to the judiciary in a select group

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Tex. May 21, 1992); *Bancroft, et al.* v. *Kneipper, et. al.*, CA3-90-2754-D, slip op. at 9 (N.D. Tex. April 30, 1992). The circumstances in these cases are distinct, and on both occasions, the court reserved the right to find the statute unconstitutional at a later time.

of cases. Section 27(A), however, offends the separation of power principles in abolishing the retroactive application of the *Lampf* rule mandated as a matter of *constitutional* law by *Beam*. Section 27(A) is additionally violative of the constitution by undermining the finality of the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants as a result of such judgment.

In their first argument, Defendants assert that Section 27(A) violates the separation of powers in that Congress directs courts to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged.

Defendants' first argument is without merit. The fact that Congress chose to incorporate the statute of limitations existing in the applicable jurisdiction, rather than prescribe a specific statute of limitations for Section 10(b), has no bearing on whether a change has occurred in the law. *See Robertson* v. *Seattle Audubon Society*, ___ U.S. ____, 112 S. Ct. 1407, 1413, (March 25, 1992).[3] It is beyond question that the

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3. Defendants cite to cases where the courts found the separation of powers principle offended by Section 27(a), because Congress had directed a particular outcome without changing the underlying law. *See In re Brichard Securities Litigation*, 788 F. Supp. 1098 (N.D. Cal. March 27, 1992); *Bank of Denver* v. *Southeastern Capital Group, Inc.*, 1992 U.S. Dist. LEXIS 3764 (D. Col. March 20, 1992); and *Johnston, et al.* v. *Cigna Corporation, et al.*, 1992 U.S. Dist. LEXIS 3666 (D. Col. March 20, 1992). This Court is not persuaded by the reasoning of these cases, and instead aligns itself with the cases cited *supra* holding that by enactment of Section 27(A), Congress effectuated a change in the law. However, as discussed below, this determination does not bring an end to the Court's consideration of the separation of powers principle and the constitutionality of Section 27(a). *See infra* pages 9-15.

enactment of Section 27(A) effectuated a change in the law. *See, e.g., Hastie* v. *American Agri-Corp.*, No. SACV89-433 GLT, slip. op at 7-8 (C.D. Ca. April 20, 1992); *Hindler, Inc. et al* v. *Telequest, Inc., et al*, Civ. No. 89-0847, slip op. at 2-3 (S.D. Cal. March 31, 1992); *VenturTech Il. Limited Partnership et al.* v. *Deloitte Haskins & Sells, et al.*, No. 88-1012-Civ-5-H, slip op. at 3-4 (E.D.N.C. February 24, 1992); *Ayers, et al.* v. *Sutliffe, et al.*, 1992 U.S. Dist. Lexis 3219, at *4 (S.D. Ohio February 11, 1992); *James Bankard, et al.* v. *First Carolina Communications, Inc. et al.*, 1992 U.S. Dist. LEXIS 53, at *17-18 (N.D. Ill. January 3, 1992).

In their second argument, Defendants claim that dismissal with prejudice of Pacific Mutual's claims as time barred vested in them the fundamental "right of repose" which can not be taken away by subsequent legislation.

It is clear that statutes of limitations do not by themselves create "fundamental rights," and that they instead are necessary and pragmatic procedural devices "subject to a relatively large degree of legislative control." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314, (1945). For this reason, courts have found no constitutional violation in applying Section 27(A) to cases where a final judgment has not been entered. *See Hastie, supra*, slip op. at 8; *VenturTech II, supra*, slip. op. at 4.

However, where a once existing statute of limitations results in the *final* adjudication of a case, a change in the applicable period of limitations if applied retroactively to reinstate that case implicates constitutional guarantees. *See Chase Securities Corp.*, 325 U.S. at 310, 316. The Supreme Court has held consistently that,

> It is not within the power of a legislature to take away rights which have once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough v. *Virginia*, 172 U.S. 102, 123-24 (1898). *See also Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923); *de Rodulfa* v. *United States*, 461 F.2d 1240, 1252 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). These cases have given rise to the so called "vested rights" doctrine. *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S 1090 (1989).

The United States urges this Court not to extend the same constitutional protection afforded a final judgment on the merits to a final judgment resulting from a mere technicality, such as a lapsed statute of limitations.[4] Some courts have upheld the constitutionality of Section 27(A) based on the distinction proposed by the United States, stating:

> Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the

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4. Along the same lines, the United States also argues that the Defendants do not have a "vested right" in a final judgment resulting from application of the statute of limitations, and relies on *Capello* v. *District of Columbia Board of Education*, 699 F. Supp. 14 (D.D.C. 1987) for this proposition. In *Capello*, the court upheld the validity of an amendment to the Education of the Handicapped Act, 20 U.S.C. § 1415 (1986), which reinstated an attorney fee award previously held impermissible by the Supreme Court. The court applied the amendment to the application for fees *pending* before it, and found that while the application was pending, the government had not acquired a vested right in being free from payment of fees. *Id.* at 18-19. This case has no bearing on vested rights arising from final judgments based on the merits or otherwise.

> heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question.

Alex Johnson, Inc. v. *Arthur Andersen & Co.*, No. 89-9469, slip. op. at 16 (S.D.N.Y. April 25, 1992); *see also Brown* v. *The Hutton Group*, 1992 U.S. LEXIS 5818, at *24 (S.D.N.Y. April 27, 1992).

Perhaps if it were only a question of degree — which type of legislative action more offends the independence of the judiciary—the proposed distinction would be tenable. Separation of powers, however, is not a subject open to compromise. A small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion. Supreme Court rulings on the inviolability of final judgments do not allow for such a distinction.[5]

It is important to recognize that it is not the statute of limitations which at any given point in time vests in the

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5. The United States argues that the Supreme Court ruling in *United States* v. *Sioux Nation of Indians*, 488 U.S. 371 (1980), supports the type of distinction it proposes. In *Sioux Nation*, the Supreme Court upheld the validity of a congressional statute despite the fact that it allowed for the relitigation of claims against the United States by the Sioux Indians. In so finding, the Supreme Court stated that "Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim *against the United States* does not violate the doctrine of separation of powers." *Id.* at 407 (emphasis added). This ruling was premised on the government's moral duty to pay a debt for which it was obligated, and the recognition that Congress itself is the government and is entitled to waive the protection to which it is entitled. *Id.* at 397-98. In the instant case, where the government is not the party affected by a final judgment, *Sioux Nation* does not call for a distinction between final judgments resulting from adjudication on the merits and those resulting from application of technical rules of procedure.

Defendants a constitutional right, but rather it is the finality of judgment which resulted from application of the *Lampf* rule which shelters the Defendants in this case. Two other courts which have considered the effect of Section 27(A) on the finality of judgments have similarly concluded that constitutional principles have been violated. *In re Brichard Securities Litigation*, 788 F. Supp. 1098, 1106-07 (N.D. Cal. 1992); *Johnston, et al.* v. *Cigna Corporation*, et al., 1992 U.S. Dist. Lexis 3666, at *3 (D. Col. March 20, 1992).

The third argument the Court will consider is one not pled directly by the Defendants, but one that figures prominently in the cases cited by them. The issue before the Court is the same as that facing the court in *TGX Corp.* v. *Simmons*, 786 F. Supp. 587 (E.D. La. 1992),

> Once a court finds that a congressional enactment has changed the law, the court must then review the enactment itself, to assure that its substance does not constitute an impermissible legislative encroachment on the judicial power. Thus, because this court has determined that section 27(A) has changed the law, the court must now consider whether section 27(A) changes the law in a manner consistent with established separation of powers principles.

Id. at 592 n.5.

It is a longstanding principle that Congress may not enact a law that contravenes the Supreme Court's judgment on questions of constitutional interpretation. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1981). It is alone the prerogative of the judiciary to determine constitutional principles, which can not be altered or amended by the legislature.

As discussed above, Section 27(A) is aimed at abolishing solely the retroactive application of the *Lampf* rule. Moreover, the retroactive application of *Lampf* is largely the result of another Supreme Court decision issued the same day as *Lampf* in the case of *Beam*. The dispositive question, therefore, is whether the retroactive application mandated by *Beam* should be accorded the status of a constitutional principle.

Two other courts have tackled this question in determining the constitutionality of Section 27(A)—an admittedly complicated task in view of the plurality opinion of the Justices in *Beam*. *See Brichard*, 788 F. Supp. at 1108-12; *TGX*, 786 F. Supp. at 592-94. Both courts have concluded that the *Beam* decision reflects judicial interpretation of the constitution, and that Section 27(A) to the extent that it undermines retroactive application of the *Lampf* rule is unconstitutional.

The United States, however, argues that *Beam* is not a constitutional decision, and that even if it is accorded such a status, it is binding only upon the judiciary and does not prohibit Congress from passing laws that alter the retroactive effect of court decisions.

In *Beam*, the Supreme Court held,

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it *must* do so with respect to all others not barred by procedural requirements or res judicata.

111 S. Ct. at 2448 (emphasis added). In issuing this mandate to all courts, the Supreme Court largely relied on the equitable principle that similarly situated parties must be treated

the same by the law, and on the case of *Griffith* v. *Kentucky*,[6] 479 U.S. 314 (1987), which previously employed the same principle in the criminal context. Departure from such equitable treatment strikes at the heart of the power of precedent, and undermines the integrity of the judicial system. *Beam*, 111 S. Ct. at 2447-51. In effect, the source of such a ruling can not be other than the constitution.[7]

Yet the question remains whether this constitutional principle was meant only to bind the judiciary and give free reign to Congress to alter the retroactive application of laws once they have been applied retroactively by the judiciary. The language quoted above on its face imposes a constraint only upon the judiciary. But the reasoning underlying the mandate must by necessity extend to Congress as well. Congressional action eliminating retroactive application of laws already applied retroactively by the judiciary suffers from the *same* two constitutional infirmities: it threatens the integrity and independence of the judiciary, and fails to treat like parties alike.[8]

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6. Unlike *Beam*, *Griffith* is not a plurality opinion and therefor lends itself to a more straightforward reading. *Griffith* explicitly premises its holding, identical to that of *Beam*, but in the criminal context, on "basic norms of constitutional adjudication." 479 U.S. at 322. These norms implicate two principles. First, the integrity of judicial review requires that the courts apply the same rule to all similar cases pending on direct review; and second, similarly situated parties must be treated the same by the law. *Id*. at 322-23.

7. Three of the Justices concurring in the judgment of the Court in *Beam*, in a six to three ruling, *explicitly* premise their holding on the constitution: Justices Blackmun, Marshall and Scalia. 111 S. Ct. at 2449-51.

8. This second infirmity takes life largely from the Court's earlier finding that final decisions can not be reinstated by Congress. Thus, parties subject to final judgments are precluded from reinstating their Section 10(b) claims, whereas "similarly situated" parties in pending actions can reassert their Section 10(b) claims.

This lengthy analysis, distilled, leads simply to this: The Supreme Court mandates retroactive application of laws once applied retroactively by the courts as a basic norm of *constitutional* adjudication. Thus, henceforth, any reformulation of this principle of retroactivity can occur solely at the hands of the judiciary, and not Congress.[9] This Court hereby aligns itself with the rulings in *TGX, supra* and *Brichard, supra*.

This Court can not sustain the validity of Section 27A in view of the fact that (1) it undermines the constitutionally protected rights once vested in Defendants by virtue of the final judgment entered in this case; and (2) it encroaches on the Supreme Court's provision for retroactive application of the *Lampf* rule as a constitutional matter.[10] In sum, Section 27(A) is unconstitutional.

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9. The United States argues that it is well settled that Congress can enact legislation to reverse the effect of a Supreme Court decision and require that the new law be applied retroactively to cases filed before that Supreme Court decision. *See, e.g., Tonya K.* v. *Board of Education of Chicago*, 847 F.2d 1243, 1247-48 (7th Cir. 1988); *Moore* v. *District of Columbia*, 666 F. Supp. 263, 264-65 (D.D.C. 1987), *aff'd*, 907 F.2d 165 (D.C. Cir. 1990) (en banc). These cases, however, are inapposite to the instant case. It is uniquely in *constitutional* pronouncements by the judiciary that the hands of Congress are tied.

10. On this same basis, Section 27(A)(a), which is not directly before us, is also constitutionally infirm by removing the retroactive application of the *Lampf* rule to pending cases. Section 27(A)(a) reads,

> **EFFECT ON PENDING CAUSES OF ACTION.** — The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed in June 19, 1991.

IV. Conclusion

Based on the foregoing reasons, Plaintiff Pacific Mutual's Motion to Reinstate Action is DENIED.

SO ORDERED.

DATED: July 13, 1992

/signed/

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas

Supreme Court, U.S.
FILED
NOV 18 1993
OFFICE OF THE CLERK

No. 93-609

In The

Supreme Court of the United States

October Term, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO., INC., GOLDMAN SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS, INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEWART M. WELTMAN
STEWART M. WELTMAN & ASSOCIATES, P.C.
135 South LaSalle Street, Suite 1918
Chicago, Illinois 60603
(312) 357-0370

Attorneys for Respondent

November 18, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RULES

Fed. R. Civ. P. Rule 60 8

I. STATEMENT OF THE CASE

Contrary to Petitioners' contentions, there is no 200 year old bright line of decisions emanating from this Court that controls this case. Furthermore, the Fifth Circuit, in finding Section 27A(b) constitutional did not breach "founding" principles "premised on the separation of powers and due process doctrines that are as old as the Republic itself." (Petition for a Writ of Certiorari at p. 3, hereafter "Pet. at p. ___").

Simply stated, Section 27A(b) is a constitutional enactment. In enacting Section 27A(b), Congress was exercising its legislative prerogative based upon two simple and well settled principles – (1) that the power of Congress to regulate commerce is supreme and plenary; and (2) that the creation or duration of statutes of limitation are a matter of legislative grace peculiarly within the province of the Congress.

One need look no further than this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), to establish that it is Congress' constitutional prerogative to set statutes of limitations for persons defrauded in the sale of securities traded on national markets. In *Lampf*, this Court devoted a major portion of its discussion to determining, in the absence of an express statute of limitation, what Congress intended to be the statute of limitations for claims brought under Section 10(b). In enacting Section 27A, Congress expressly stated what it intended the statute of limitations to be for a discreet class of persons, those plaintiffs who had cases pending at the time that *Lampf* was announced and who suffered dismissals as a result. In essence, Congress

determined that it was in the best interests of interstate commerce, and the protection of the integrity of the securities markets, that persons who might be denied a Federal remedy by operation of the decision in *Lampf*, be given a new remedy. There is nothing wrong with this. In fact it is entirely beyond constitutional reproach.

Under its plenary Commerce Clause powers, Congress could have created an entirely new cause of action in the class of persons covered by Section 27A(b), made the legislation retroactive,[1] and given it as long a statute of limitations as it desired – *e.g.*, 10 or even 20 years. In enacting Section 27A(b) Congress did less than what it constitutionally could. Moreover, although the procedural requirements set forth in Section 27A(b) state that in order for these plaintiffs to obtain the benefit of Section 27A(b) they must seek "reinstatement", the constitutional propriety of Section 27A(b) should not be judged in this context.

The fact is that Petitioners do not contest that Congress, if it so desired, could have created an entirely new cause of action for this discreet class of persons, identical to that of Section 10(b), with a statute of limitations as long as Congress desired. Petitioners merely contest that Congress chose to articulate this new cause of action in the procedural language of "reinstatement." The fact that

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[1] "It is clear, however, that Congress may, without violating the due process clause, enact legislation imposing economic burdens retroactively if it is justified by a 'legitimate legislative purpose furthered by rational means.' " *Licari v. C.I.R.*, 946 F.2d 690, 693 (9th Cir. 1991) (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)).

Congress chose to use the linguistic shorthand of describing this newly created right or cause of action in the procedural context of a "reinstatement" cannot and should not act as a delimiter on Congress' constitutional prerogative in regulating interstate commerce.

In short, the core of Petitioners' contentions center upon Section 27A(b)'s use of the term reinstatement. They view the use of the term reinstatement in Section 27A(b) as an encroachment upon the judiciary and a violation of their purported due process interests in the final judgment entered on the basis of *Lampf*. Apart from the fact that these contentions are without merit, the fact is that since Congress could have done more (*e.g.*, created an entirely new cause of action), that it phrased Section 27A(b) in terms of something less (*e.g.*, reinstatement) does not make it unconstitutional.

This is not something worthy of this Court granting a writ of certiorari, regardless of the fact that there is conflict amongst the circuits, due to the Sixth Circuit's recent decision in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993).

II. PROCEDURAL HISTORY

On March 1, 1991, Respondent, Pacific Mutual Life, filed a Section 10(b) securities and common law fraud action against, *inter alia*, Goldman Sachs, Morgan Stanley, Salomon Brothers, and Ernst & Young, (hereafter "Petitioners"), arising out of Petitioners' involvement with the 1987 merger of the Republic and InterFirst banks. At the time that Respondent's action was filed, the law governing the statute of limitations for Section 10(b) claims

brought in Texas Federal Courts was controlled by the Fifth Circuit's opinion in *Sioux Ltd., Sec. Litigation v. Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990), holding that there was a four-year statute of limitations. Since the complaint alleged that the wrongful conduct of Petitioners occurred within this four-year period, Respondent's claim was timely filed under the then applicable law of the Fifth Circuit.

On June 20, 1992 the Sup-eme Court, in *Lampf*, held that a claim under Section 10(b) must be commenced within one year after the discovery of facts constituting the violation and within three years after such violation. *Id.* at 2782, and n. 9.

On the authority of the *Lampf* decision and in a series of orders, the District Court granted Petitioners' motions to dismiss Respondent's Section 10(b) claims with prejudice as being time-barred and refused to exercise pendent jurisdiction over Respondent's state law claims.

In light of this Court's clear pronouncement as to the retroactivity of the *Lampf* decision,[2] Respondent elected not to appeal this ruling and instead chose to pursue its state law claims in Texas State Court.

In 1991 Congress enacted Section 27A, and it was signed into law and became effective on December 19, 1991. It provided in pertinent part:

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[2] See, *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991).

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 –

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991. (See U.S.C. Sec. 78aa-1)

On January 31, 1992, within the sixty day period provided for in Section 27A for previously dismissed actions to be reinstated, Respondent filed its Motion To Reinstate. Petitioners opposed this motion on the grounds that Section 27A was unconstitutional. On July 13, 1992 the District Court denied Respondent's motion to reinstate based upon its view that Section 27A was unconstitutional for two primary reasons: (1) Section 27A offended the separation of powers because it abolished the retroactive application of *Lampf* and thus impermissibly invaded the powers of the judiciary to have their decisions apply retroactively; and (2) Section 27A impermissibly divested Petitioners of their vested right in the finality of the District Court's previous judgment of dismissal of Respondent's claims.

Respondent appealed this dismissal to the Fifth Circuit, and on July 20, 1993, the Fifth Circuit reversed, finding that Section 27A(b) was constitutional.

III. ARGUMENT

A. Section 27A Does Not Operate To Divest Defendants Of Any "Vested Rights"

Petitioners contend that they had a vested right in the final judgment of dismissal dated August 16, 1991, which could not be constitutionally "revived" through a subsequent enactment of Congress. The first error in this contention centers upon the Petitioners' misapprehension of Congress' powers in the regulation of interstate commerce. Since Congress' powers in this area entitle it to create retroactive causes of action, what it did in connection with Section 27A(b) is entirely constitutional.

Moreover, as a matter of general constitutional principle no defendant has a vested right in a claim being barred by a statute of limitation. In *Jago v. Van Curen*, 454 U.S. 14, 17 (1981), this Court reiterated its view that, "In this case, as in our previous cases, '[t]he question is not merely the "weight" of the individual's interest, *but whether the nature of the interest is one within the contemplation of the "liberty or property language of the Fourteenth Amendment."* ' "[3] (Emphasis added.)

Petitioners are hard pressed to argue that their due process rights have been violated when they were timely sued under then applicable law, only to be temporarily saved by an unexpected intervening Supreme Court decision, and then six months later have that liability attach again through prompt Congressional action.

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[3] Although, *Jago* was a case decided under the Fourteenth Amendment, its overall maxim regarding the limits of property interests protected by due process is equally applicable herein.

This is particularly so where, as here, Respondent was, at the time of its motion for reinstatement pursuant to Section 27A(b), pursuing state law claims based upon the same nucleus of operative facts as its federal securities claims.

As one court has noted, the vested rights doctrine, "rests on twin constitutional bases, one that a final judgment affords the parties rights that may be equated to a form of property enjoying due process protection, and the second that separation of powers principles preclude legislative reopening of adjudicated cases." *Axel Johnson Inc. v Arthur Andersen & Co.*, 790 F. Supp. 476 (S.D.N.Y. 1992).

The August 16, 1991 order did not give Petitioners "an award of damages, cost[s], or the right to receive any property." *Casserly v. Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. at 8 (D. Minn. July 2, 1992) (rejecting argument that defendant had vested right in judgment and granting a motion to reinstate a dismissed claim under Section 27A(b)). Rather, it merely deprived Respondent of a federal claim against Petitioners and a federal forum in which to litigate. Respondent still has state law claims against Petitioners arising out of the same nucleus of operative facts. Thus, although the District Court's August 16, 1991 order created what might be characterized as "a loose benefit" to Petitioners, this "benefit" simply does not rise to the level of a specific benefit protected by the due process clause and/or the vested rights doctrine.

In the one case that is closely on point to the issues raised in Petitioners' writ, this Court stated in *Chase*

Securities Corp. v. Donaldson, 325 U.S. 304 (1945), that statutes of limitation:

> [R]epresent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right . . . [litigants] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase, 325 U.S. at 314.

Since *Chase*, no decision of the Supreme Court, including *Chase*, has ever held that a defendant has a vested right in a final judgment of dismissal. Those cases that have discussed the "vested rights" doctrine in the context of a final judgment have been cases involving a judgment that has in some fashion awarded money or some other valuable property right, such that a retroactive application of a newly enacted statute would operate to deprive the litigant of an actual property right. See *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923).[4]

Other than being relieved of their liability exposure for Respondent's federal claims, the August 16, 1991 judgment did not award Petitioners any actual property. As noted above, the Court in *Chase* expressly noted that a

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[4] That a defendant does not have a fundamental right in a final judgement, and that Congress may create legislation that opens up final judgements, is reflected in the fact that Fed. R. Civ. P. Rule 60, an enactment of Congress, permits the opening of final judgements under certain circumstances.

defendant has no fundamental right in whatever protection a statute of limitations may afford in all circumstances.

Moreover, the Court in *Chase* found that the lifting of the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is not a *per se* violation of due process. *Id.* at 316. In *Chase*, the Court observed that while there might be instances where the retroactive application of a statute might invade fundamental rights, in order for this to be established the party making such a claim had to show that, independent of the fact that the defendant was exposed to a liability that was previously barred, the retroactive lifting of the bar of the statute of limitations caused some special hardship or oppression. *Id.* at 315-316. No such hardship or oppression has been shown by the Petitioners in the courts below.

For these reasons, no due process right has been established in the courts below, and as such the writ should be denied.

B. Section 27A Does Not Violate the Separation of Power Principles

Petitioners contend that Section 27A(b) reverses final judgments and thus invades the Judiciary's powers granted under Article III of the Constitution. Simply stated, this contention is premised upon the false assumption that Section 27A(b) is designed to reverse the judgments entered upon the basis of *Lampf* as opposed to creating a new statute of limitations for a discreet class of

persons whose claims arise under a Congressional enactment promulgated under the Commerce Clause. If anything, a judicial declaration that Section 27A(b) was unconstitutional would in itself be an improper invasion of the Congress' Commerce Clause powers.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition For a Writ of Certiorari.

Dated: Chicago, Illinois
November 18, 1993

Respectfully submitted,

STEWART M. WELTMAN
STEWART M. WELTMAN & ASSOCIATES, P.C.
135 South LaSalle Street, Suite 1918
Chicago, Illinois 60603
(312) 357-0370

Attorney for Respondent

SUPREME COURT, U.S.
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No. 93-609

In the Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, ET AL.,
PETITIONERS

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20539
(202) 514-2217

SIMON M. LORNE
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), which provides for the reinstatement of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is reported at 997 F.2d 39. The opinion of the district court, Pet. App. B1-B15, is reported at 806 F. Supp. 108.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1991, respondent Pacific Mutual Life Insurance Company (Pacific Mutual) filed a securities fraud action against petitioners in the

United States District Court for the Northern District of Texas. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state common law claims. Pacific Mutual's claims arose from securities transactions that occurred in July and September 1987, approximately three and one-half years before it filed suit. Pet. App. A3.

At the time Pacific Mutual brought suit, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *In re Sioux, Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). The applicable Texas statute of limitations subjected Pacific Mutual's claims to a four-year limitations period. *Ibid.* Accordingly, petitioners did not contest the timeliness of this action. Pet. App. A3.

On June 20, 1991, while the action was pending before the district court, this Court rendered its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* holds that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same

day that *Lampf* was decided, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of a judicial rule of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Shortly thereafter, petitioners moved for dismissal of this suit on the ground that it was untimely under the federal limitations period adopted in *Lampf* and made retroactive by *Beam*.[1] In August 1991, the district court dismissed the federal claims with prejudice under *Lampf*. Because the federal claims were plainly untimely under *Lampf*, Pacific Mutual did not appeal. Pet. App. A4.

2. In December 1991, four months after the dismissal of this action, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. Subsection (b) of Section 27A provides for the reinstatement of pre-

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[1] This Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions.

Lampf suits that were dismissed as time-barred under *Lampf* but were timely under the jurisdiction's pre-*Lampf* rules. Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(a) and (b) (Supp. III 1991).

In January 1992, within the 60-day period prescribed by subsection (b), Pacific Mutual moved to reinstate its federal securities claims. Pet. App. A5. The district court denied the reinstatement motion in July 1992 on the ground that subsection (b) is unconstitutional. *Id.* at B1-B15. The district court held that subsection (b) violates the separation of powers doctrine by reopening final judgments of federal courts. *Id.* at B5-B15.

3. Pacific Mutual appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[2] and the United States intervened in both appeals, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 27A.[3] Pet. App. A8.

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A33. The court held that neither the separation of

[2] *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir.), petitions for cert. pending *sub nom. BDO Seidman* v. *Simmons*, No. 93-313 (filed Aug. 26, 1993), and *Continental Insurance Co.* v. *Simmons*, No. 93-611 (filed Oct. 18, 1993).

[3] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

powers doctrine nor the Due Process Clause of the Fifth Amendment prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A14-A25, A29-A33.

ARGUMENT

Petitioners challenge the holding of the court of appeals that Section 27A(b) of the Exchange Act is constitutional. Pet. 9-20. In our view, the court of appeals correctly rejected petitioners' constitutional claims and upheld Section 27A(b). The Fifth Circuit's decision, however, conflicts with *Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), rehearing denied (Oct. 14, 1993), in which the Sixth Circuit held that Section 27A(b) violates the separation of powers doctrine.[4] In so holding, *Plaut* squarely rejected the constitutional views adopted by the Fifth Circuit here.

Because the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in this case, because the Sixth Circuit's decision in *Plaut* invalidates an Act of Congress, and because the constitutional issue arises in a number of additional cases of which we are aware,[5] the Court should resolve the

[4] We note that the constitutionality of subsection (b) of Section 27A is currently before the Tenth Circuit in *Johnston* v. *CIGNA Corp.*, No. 92-1186 (argued Sept. 27, 1993). The Second Circuit rejected a constitutional challenge to subsection (b) in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (Sept. 27, 1993), but it rested its decision on narrow grounds (the absence of a final judgment in the case) and did not decide the constitutionality of the provision as a general matter.

[5] Rule 10b-5 claims were reinstated under subsection (b) in *Adler* v. *Berg Harmon Associates*, No. 89 Civ 8114 (S.D.N.Y.);

constitutionality of subsection (b) of Section 27A.[6] The constitutional issues are squarely presented by the present petition, and we are unaware of any procedural obstacle in this case that would prevent the Court from resolving those issues here.[7]

Casserly v. *Shearson Lehman Hutton*, No. 4-90-125 (D. Minn); cf. *Johnston* v. *CIGNA Corp.*, *supra* (motion denied).

[6] In contrast, there is no circuit conflict over the constitutionality of subsection *(a)* of Section 27A. Seven courts of appeals have held subsection (a) to be constitutional; none has held otherwise; and this Court has twice denied certiorari petitions seeking review of that issue. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. Sept. 27, 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

[7] In contrast, the petitions in *BDO Seidman* v. *Simmons*, No. 93-313, and *Continental Insurance Co.* v. *Simmons*, No. 93-611, which seek review of the same court of appeals decision, but arise out of a different district court action, see note 2, *supra*, are not suitable vehicles for review of the constitutional issues. As we explain in our response to those petitions (a copy of which has been served on petitioners here), the Section 10(b) litigation involved in No. 93-313 and No. 93-611 was dismissed under *Lampf* without prejudice. The reinstatement of those actions under Section 27A(b) therefore raises, at most, only a narrow constitutional issue. Because the action involved in this petition was dismissed under *Lampf* with prejudice, the present petition is a better vehicle than the petitions in No. 93-313 and No. 93-611 for reviewing the constitutionality of subsection (b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SIMON M. LORNE
General Counsel

FRANK W. HUNGER
Assistant Attorney General

PAUL GONSON
Solicitor

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Special Counsel
Securities and Exchange Commission

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IN THE

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October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

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REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Petitioner
Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Petitioner
Ernst & Young

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Petitioner
Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Petitioner
Salomon Brothers Inc

* *Counsel of Record*

December 15, 1993

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PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

REASONS FOR GRANTING THE WRIT

The Solicitor General has requested that this Petition be granted "[b]ecause the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in the case, because the Sixth Circuit's decision in *Plaut*[1] invalidates an act of

1. *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993), *pet. for rehearing denied*, No. 92-5591 (6th Cir. Oct. 14, 1993).

Congress and because the constitutional issue arises in a number of additional cases of which we are aware." Brief for the United States at 5. The Solicitor General also notes that these issues "are squarely presented by the present [P]etition, and we are unaware of any procedural obstacle in this case that would prevent the Court from resolving those issues here." *Id.* at 6.[2]

Following the filing of the Government's brief, the Tenth Circuit issued its decision in *Johnston* v. *Cigna Corp.*, 1993 WL 500842 (10th Cir. Dec. 8, 1993), holding that Section 27A(b), as applied to final judgments entered prior to the enactment of § 27A, violates the Constitution. Widening the direct split among the circuits over the constitutional issues raised in the Petition, the *Johnston* court specifically followed *Plaut* and rejected the reasoning of the Fifth Circuit in this case. The *Johnston* court held that the "principle from *Hayburn's Case*[3] that '[t]he federal judiciary will not have its decision in a case frustrated by having it subjected to revision, suspension, modification, or other review by the executive or legislative branches,'" *id.* at *9 (citation omitted) "remains as alive today as it was when our nation was founded." *Id.* at *10.[4]

In marked contrast, the brief of Respondent Pacific Mutual Life Ins. Co. ("Pacific Mutual") in Opposition to Petition for a Writ of Certiorari ("Resp. Br.") creates a statute that never existed, defends it (unsuccessfully) against an attack never

2. Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

3. 2 U.S. (2 Dall.) 409 (1792).

4. The position of the dissent in *Johnston* also demonstrates the split in the lower courts. The dissent explicitly rejected what it considered to be the "forceful decision" in *Plaut* in favor of what it termed the "stronger reasoning" of *Pacific Mutual*. 1993 WL 500842, at *13 (Holloway, J., dissenting).

mounted, and concludes that, because the fictitious statute might have saved Pacific Mutual's federal claim, this case is not worthy of certiorari. Only the barest reference is made to *Plaut*; none of the relevant precedents cited by *Plaut*, or Petitioners, is mentioned, let alone distinguished; and the very constitutional issue that creates the split between the Fifth and Sixth Circuits, separation of powers, is all but ignored.

Rather than addressing whether this issue is worthy of certiorari, the heart of Pacific Mutual's opposition is its assertion that without implicating any constitutional concerns Congress could have legislated an "entirely new cause of action" and "given it as long a statute of limitations as it desired." Resp. Br. 2. Indeed, Pacific Mutual contends that this is essentially what Section 27A achieved and Congress' use of the "reinstatement" mechanism was merely "linguistic shorthand."

To begin with, Congress did *not* pass this hypothetical legislation and that is the end of the argument. And, in any event, Pacific Mutual has acknowledged that even new legislation, creating a new cause of action, cannot overturn a judgment that "has in some fashion awarded ... some other valuable property right, such that a retroactive application of a newly enacted statute would operate to deprive the litigant of an actual property right." Resp. Br. 8 (citing *Hodges* v. *Snyder*, 261 U.S. 600, 603-04 (1923)).[5]

5. Quite apart from constitutional barriers, Congressional adoption of the hypothetical statute posited by Pacific Mutual would not have affected the finality of the judgment of dismissal in petitioners' favor, the preclusive effect of which would have precluded any new suits arising out of the same underlying transactions, even if based on a "different legal theory or source of law." *Aunyx Corp.* v. *Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1416 (1993); *Armstrong* v. *Norwest Bank*, 964 F.2d 797, 802 (8th Cir. 1992). As a general rule, changes in law do not prevent the application of *res judicata*. *Clifton* v. *Attorney General*, 997 F.2d 660, 663 (9th Cir. 1993); *Wilson* v. *Lynaugh*, 878 F.2d 846, 850 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989). *See Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) (*res judicata* effect not altered by the fact that judgment "rested on a legal principle subsequently overruled in another case"). The primary exception to this

Pacific Mutual contends, however, that Petitioners are not entitled to the due process protection accorded by *Hodges* and other cases because the judgment in Petitioners' favor on limitations period grounds conferred no " 'award of damages, costs, or the right to receive any property.' " Resp. Br. 7.[6] If accepted, this assertion — that no final judgment of dismissal is worthy of Article III or due process protection — would make innumerable decisions of the federal courts vulnerable to legislative review. Accordingly, regardless of its merits, Respondent's articulation of the issue establishes that this case is worthy of certiorari.

Respondent's position is also without merit. Logic and precedent establish that the right not to pay money is as valuable as the right to receive money.[7] Indeed, as the Fifth

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rule — for civil rights cases (*Wilson*, 878 F.2d at 850) — does not apply here.

6. Respondent cites *Jago* v. *Van Curen*, 454 U.S. 14, 17 (1981), which found that an inmate's due process rights were not violated by rescission without an opportunity for hearing, based on fraud by the inmate, of a preliminary decision to grant parole. *Jago* is thus easily distinguishable from this case, which involves property interests vested in the final judgment of an Article III Court.

7. Judgments of dismissal convey due process rights even though the winning party receives no monetary award. *See Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 812 (11th Cir. 1988) ("Like an award of damages or an award of costs, the right to receive — and conversely, the *right not to pay* — attorney's fees, is, in the parlance of these cases, a private right not subject to divestiture") (emphasis supplied), *cert. denied*, 490 U.S. 1090 (1989); *see also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (due process clause protects "civil litigants who seek recourse in the courts ... as defendants hoping to protect their property"). And judgments based on limitations grounds are substantive. *See Johnston*, 1993 WL 500842, at *7 ("A decision by a federal court adjudging a claim to be time barred is a final judgment on the merits and once a claim is so adjudged, Congress cannot direct the court to reopen the judgment."); Fed. R. Civ. P. 41 (b) (limitations dismissal operates as adjudication on the merits); *see also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (limitations periods convey " 'the right to be free of stale claims' ").

Circuit acknowledged, Petitioners have shown that the final judgment itself is "a species of property right." *First Republicbank Corp.* v. *Pacific Mutual Life Ins. Co.*, 997 F.2d 39, 51 n.14 (A-25); *see also Johnston* v. *Cigna Corp.*, 1993 WL 500842 at *5 (10th Cir. Dec. 8, 1993) ("once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property") (citing *Axel Johnson* v. *Arthur Andersen & Co.*, 1993 U.S. App. LEXIS 24954, at *16 (2d Cir. Sept. 27, 1993)).[8] Thus, regardless of its basis, the judgment itself triggers constitutional protection, as this Court recognized in *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), the decision upon which Pacific Mutual principally relies.[9]

Accordingly, none of Pacific Mutual's arguments is sufficient to overcome the showing by Petitioners, supported by the Solicitor General, that the issues presented by the Petition are worthy of certiorari.

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8. Moreover, as Pacific Mutual concedes, the final judgment of the district court provided Petitioners with the tangible right to relief from exposure to Section 10(b) claims under the Securities Exchange Act of 1934 (which as a matter of law cannot be heard in state court). *See* Resp. Br. at 8.

9. *Id.* at 310 (limitations periods may be changed because case was "*not* one where a defendant's statutory immunity from suit had been finally adjudged so that legislative action deprived it of a final judgment in its favor") (emphasis supplied); *id.* at 316 (no constitutional right "before final adjudication"). *See also Johnston*, 1993 WL 500842 at *6 (*Chase* did not involve a final judgment); *Plaut*, 1 F.3d at 1496 ("Congress may change an established time bar ... But where the courts have adjudged a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment.") (discussing *Chase*); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) ("Even though Defendants do not have vested rights in a particular statute of limitations, Defendants do have vested rights in this Court's judgment dismissing Plaintiff's Section 10(b) claims.") (discussing *Chase*).

CONCLUSION

The Petition should be granted to address the fundamental separation of powers and due process questions posed by this case.

Dated: New York, New York
December 15, 1993

Respectfully submitted,

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201
(214) 855-3000

Attorneys for Petitioner
Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017
(212) 773-3800

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5000

Attorneys for Petitioner
Ernst & Young

* *Counsel of Record*

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202
(214) 761-2800

Attorneys for Petitioner
Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149
(212) 371-9200

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000

Attorneys for Petitioner
Salomon Brothers Inc

Supreme Court, U.S.
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No. 93-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

William R. Norfolk
Theodore Edelman
Timothy J. Helwick
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

Fletcher L. Yarbrough
CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Petitioners
Goldman, Sachs & Co.

Robert G. Cohen
Kathyrn A. Oberly
ERNST & YOUNG
380 Madison Avenue
New York, New York 10153

Morton L. Susman
WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Petitioners
Ernst & Young

JAMES W.B. BENKARD*
James D. Liss
Vincent T. Chang
David Rosenfeld
Arthur J. Burke
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HANNAH BERKOWITZ
New York, New York 10019

James L. Truitt
HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Petitioners
Morgan Stanley & Co. Incorporated

Robert B. Mazur
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171

Ernest E. Figari, Jr.
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Petitioners
Salomon Brothers Inc

* Counsel of Record
February 24, 1994

(Counsel Listing Continued on Inside Cover)

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 18, 1993
CERTIORARI GRANTED JANUARY 10, 1994

39 pp

Stuart M. Weltman
STEWART M. WELTMAN & ASSOCIATES, P.C.
135 South LaSalle St., Suite 1918
Chicago, Illinois 60603
(312) 357-0370

Richard G. Taranto
FARR, SMITH & TARANTO
2445 M Street, N.W., Suite 225
Washington, D.C. 20037
(202) 775-0184

Attorneys for Respondent Pacific Mutual Life Insurance Co.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 91-CV-441

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
February 1, 1991	Complaint filed by Pacific Mutual Life Ins. Co.
February 15, 1991	Amended Complaint filed by Pacific Mutual Life Ins. Co.
April 12, 1991	Motions filed by Morgan Stanley & Co., Goldman Sachs & Co., and Ernst & Young & Co. to dismiss the First Amended Complaint
April 15, 1991	Motion filed by Ernst & Young to dismiss the first amended complaint.
July 9, 1991	Motion filed by defendants to supplement their pending motions to dismiss the first amended complaint.
August 15, 1991	Order filed granting defendants' motion to supplement their pending motions to dismiss the first amended complaint. First amended complaint dismissed with prejudice in its entirety.
August 16, 1991	Memorandum Order and Opinion. Defendants' Motion to Dismiss Count I

	of Plaintiffs' First Amended Complaint is granted and Count I dismissed with prejudice as time-barred. Defendants' motions to dismiss Count II of Plaintiffs' Amended Complaint, are granted and Count II dismissed without prejudice.
August 16, 1991	Case Closed.
August 30, 1991	Order granting motion to amend last three paragraphs of order of August 15, 1991 to read: 1) Count I of the First Amended Complaint is dismissed with prejudice; and 2) Count II of the First Amended Complaint is dismissed without prejudice.
January 31, 1992	Motion by Pacific Mutual Life Ins. Co. to reinstate action.
January 31, 1992	Memorandum by Pacific Mutual Life Ins. Co. to reinstate action.
February 20, 1992	Memorandum by Defendants in Opposition to motion to reinstate action.
March 2, 1992	Reply Memorandum by Pacific Mutual Life Ins. Co. in response to motion to reinstate action.
July 13, 1992	Memorandum Opinion and Order denying motion to reinstate action.
August 7, 1992	Notice of Appeal by Pacific Mutual Life Insurance Co. from the order denying its motion to reinstate this action entered on July 13, 1992.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-CV-1662

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
August 7, 1992	Notice of Appeal filed by Pacific Mutual Life Ins. Co.
May 3, 1993	Case heard before Politz, Reavley, Barksdale, C.J.J.
July 30, 1993	Opinion and Judgment of the Court of Appeals of the Fifth Circuit
July 30, 1993	Judgment filed
October 18, 1993	Filing of Petition for writ of certiorari by defendants.
January 10, 1994	Order granting Petition for Writ of Certiorari filed

CHRONOLOGICAL LIST OF ITEMS APPEARING ELSEWHERE

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Northern District of Texas dated August 16, 1991 ..... B-1

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action

No. CA3-91-0441-D

PACIFIC MUTUAL LIFE INSURANCE CO.,

Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REINSTATE ACTION

Plaintiff Pacific Mutual Life Insurance Co. (''Pacific Mutual'') respectfully submits this memorandum of law in support of its motion to reinstate this action.

I. Introduction

This action arises out of plaintiff's purchases in July and September 1987 of InterFirst 12-¾% Notes due October 1, 1987. Plaintiff instituted this action against the defendants on March 1, 1991, asserting claims under Section 10(b) of the Securities Exchange Act of 1934 (Count I) and for common law fraud (Count II). Defendants subsequently filed motions to dismiss, contending, among other things, that plaintiff's claims were time barred under the Supreme Court's recent decision in *Lampf, Pleva, Lifkind, Prupis & Petigrow* v. *Gilbertson*, 111 S.Ct. 2773 (1991). On August 15, 1991, this Court dismissed Count I of plaintiff's first amended

complaint as time barred under *Lampf*. This Court also dismissed Count II based on its declination to exercise pendent jurisdiction. As discussed below, plaintiff's action should be reinstated under a recently enacted amendment to the Securities Exchange Act of 1934 (''Exchange Act'').

II. Plaintiff's Action Should Be Reinstated Under Section 27A of the Exchange Act

On December 19, 1991, President Bush signed the *Federal Deposit Insurance Corporation Improvement Act of 1991*, Pub.Law 102-242, 1991 S.543, 105 Stat. 2236 (''the Act''), which amends the Exchange Act by adding section 27A. Section 27A provides in pertinent part:

> (b) Effect on Dismissed Causes of Action. Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> *shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.*

(emphasis added).

Under section 27A, a section 10(b) action that was dismissed as untimely must be reinstated *if* it was timely under the law as it existed in the applicable jurisdiction on June 19, 1991, the day before *Lampf* was decided. Accordingly, in deciding this motion, this Court should look at applicable Fifth Circuit law as of June 19, 1991. *See also James Bankard, et al.* v. *First Carolina Communication, Inc., et al.*,

1992 U.S.Dist. LEXIS 53 (N.D. Ill. January 3, 1992) (analyzing whether the plaintiffs' claims were timely under Seventh Circuit law as of June 19, 1991).

Prior to *Lampf*, it was well settled law that in securities actions filed in Texas District courts, the Fifth Circuit borrowed the most closely analogous state statute of limitations. *Sioux Ltd., Sec. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990). In *Sioux*, the Fifth Circuit reaffirmed its long standing position regarding the borrowing of the most closely analogous Texas statute of limitations and held that the statute of limitations for section 10(b) action was four years. *Id.* at 64, *citing Longden* v. *Sunderman*, 737 F. Supp. 968, 971-972.

Here, plaintiff's Section 10(b) claim was filed on March 1, 1991, well within this four year period and thus, is timely under existing Fifth Circuit precedent as of June 19, 1991. Further, plaintiff has brought this motion within 60 days of the enactment of Section 27A. Accordingly, plaintiff's section 10(b) claim should be reinstated under Section 27A. Plaintiff's common law fraud claim should also be reinstated since an independent basis for the Court's jurisdiction would exist.

III. Conclusion

For the foregoing reasons, plaintiff respectfully requests the Court to grant plaintiff's motion to reinstate this action.

Dated: January 30, 1992

Respectfully submitted,

By: _____
Carol V. Gilden

Stewart M. Weltman
Illinois State Bar No. 03122196
Carol V. Gilden
Illinois State Bar No. 06185530
MUCH SHELIST FREED DENENBERG
& AMENT, P.C.
200 North LaSalle Street
Suite 2100
Chicago, Illinois 60601-1095
Telephone: (312) 346-3100

Dated: January 31, 1992

By: _____
Harold E. Vanberg, Jr.

Local Counsel:
Harold E. Vanberg, Jr.
State Bar. No. 20465500
BURLESON, PATE & GIBSON
2414 North Akard
Suite 700
Dallas, Texas 75201
Telephone: 214/871-4900
FAX: 214/954-1194

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,
Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,
Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REINSTATE ACTION

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5000

Attorneys for Defendant
Ernst & Young

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202
(214) 761-2800

Attorneys for Defendant
Morgan Stanley & Co.
Incorporated

CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court,
Dallas, Texas 75201
(214) 855-3000

Attorneys for Defendant
Goldman, Sachs & Co.

FIGARI & DAVENPORT
901 Main Street
Suite 1500 Suite 4800
Dallas, Texas 75202
(214) 939-2000

Attorneys for Defendant
Salomon Brothers Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,
Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,
Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REINSTATE ACTION

TO THE HONORABLE CHIEF JUDGE OF THE DISTRICT COURT:

Defendants Ernst & Young, Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc (''Defendants'') respectfully submit this response in opposition to plaintiff's Motion to Reinstate Action. Plaintiff seeks reinstatement of this action, which the Court dismissed on August 15, 1991, based on the recent enactment of federal legislation in response to the Supreme Court's decision regarding the statute of limitations applicable to implied causes of action under Section 10(b) of the Securities Exchange Act of 1934 (''Section 10(b)''), 15 U.S.C. § 78j(b).

Because the new legislation is unconstitutional, the Court should deny the motion to reinstate.[1]

BACKGROUND

On June 20, 1991, the Supreme Court held that actions brought under Section 10(b) must be commenced within one year of discovery of the facts constituting the violation and, under no circumstances, later than three years after the violation. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, *reh'g denied*, 112 S. Ct. 27 (1991). In another decision issued that same day, *James B. Beam Distributing Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), the Supreme Court held that where changed principles of law are applied to the parties in the proceeding in which they are enunciated, the newly-adopted rules must be also applied in all other pending proceedings.

In a Memorandum Opinion and Order signed August 15, 1991, and entered on the following day, this Court dismissed with prejudice plaintiff's Section 10(b) claim as time-barred under the holdings in *Lampf* and *James B. Beam* and dismissed without prejudice plaintiff's pendent state common-law fraud claim.[2] *See* Mem. Op. & Ord. at 9.[3]

---

1. Defendants respectfully refer the Court to Rule 24(c), Fed. R. Civ. P., which provides that "[w]hen the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403."

2. A copy of the Court's Memorandum Opinion and Order is annexed to this response as Appendix A.

3. Similarly, following James B. Beam, most federal courts have applied the limitations period prescribed by Section 9(c) of the 1934 Act to Cases pending on June 20, 1991, the day *Lampf* was decided. *See, e.g., Welch* v. *Cadre Capital*, 946 F.2d 185 (2d Cir. 1991); *Boudreau* v. *Deloitte, Haskins & Sells*, 942 F.2d 497 (8th Cir. 1991); *Anixter* v. *Home-State Prod. Co.*, 947 F.2d 897 (10th Cir. 1991); *Held* v. *Davis*, No. 89-6684-CTV, 1991 WL 243139 (S.D. Fla. Nov. 19, 1991); *Baggett* v. *Edward D. Jones & Co.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,215 (D. Kan. June 27, 1991).

Plaintiff did not appeal the Court's decision and allowed the Court's dismissal order to become a final nonappealable judgment. *See* Fed. R. App. P. 3(a) and 4(a).[4]

Thereafter, Congress debated the issue of the appropriate limitations period for Section 10(b) actions in response to political criticism of *Lampf*. Unable to forge a consensus on any proposal to establish a statute of limitations for Section 10(b) actions, Congress, by voice vote in a hasty political compromise,[5] enacted a statute designed to remove the retroactive application of the *Lampf* decision. Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991). Section 476 of the FDICIA amended the Securities Exchange Act of 1934 by adding a new Section 27A entitled "Special Provision Relating to Statute of Limitations on Private Causes of Action." Specifically, Section 27A provides:

> (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

---

4. Plaintiff elected, instead, to bring an action in the 192nd District Court of Dallas County asserting its common-law fraud claim.

5. *See* 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

(b) EFFECT ON DISMISSED CAUSES OF ACTION. — Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236. The President signed the FDICIA into law on December 19, 1991, and plaintiff subsequently filed its motion to reinstate this action under Section 476.

Plaintiff's motion, however, should be denied because Section 476 is unconstitutional for two separate, but related, reasons. First, Section 476 violates the separation of powers doctrine which prohibits Congress from "[prescribing] rules of decision to the Judicial Department of the Government in cases pending before it." *United States* v. *Klein*, 80 U.S. 128, 146 (1872). In Section 476, Congress impermissibly attempts to direct the result in statute of limitations challenges to claims brought under Section 10(b) that were filed before the Supreme Court's decisions in *Lampf* and *James B. Beam*. Second, Section 476 improperly invades the province of the judiciary by requiring Article III courts to reinstate finally dismissed actions. *See Hayburn's Case*, 2 U.S. (3 Dall.) 409, 410 n.2 (1792); *cf. United States* v. *Sioux Nation of Indians*, 448 U.S. 381, 427-29 (1980) (Rehnquist, J., dissenting) (distinguishing proceeding in which United States is a party); *Pope* v. *United States*, 323 U.S. 1, 8-9 (1944) (same). The legislation thus deprives private litigants of their vested rights

and eviscerates the principles of finality of judgments that are fundamental to American jurisprudence. *See Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113, (1948); *Hodges* v. *Snyder*, 261 U.S. 600 (1923); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856); *cf. Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 316 (1945) (state statute extending statute of limitations does not violate Fourteenth Amendment because claim had not been finally adjudicated before effective date of legislation).

ARGUMENT

I. SECTION 476 UNCONSTITUTIONALLY ENCROACHES ON THE POWERS OF THE JUDICIAL BRANCH BY DIRECTING THE FEDERAL COURTS TO REOPEN CASES IN WHICH FINAL JUDGMENTS HAVE BEEN ENTERED AND BY PRESCRIBING THE RULES OF DECISION TO RESOLVE LIMITATIONS ISSUES IN THOSE CASES.

In enacting Section 476, Congress did not prescribe a new limitations period applicable to claims under Section 10(b) because Congress could not agree on the limitations period to provide for such claims. *See* 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). Congress did not even prescribe a new limitations period for all Section 10(b) claims pending at the time of its enactment or for all Section 10(b) claims arising out of events that occurred prior to June 20, 1991. Instead, in Section 476, Congress improperly prescribed rules of decision that the federal courts must apply in a specific class of cases, i.e., those cases that were pending on June 19, 1991. In so doing, Congress has violated the principles of separation of powers embedded in the Constitution by encroaching upon the role of the judiciary to decide cases.

Section 476 imposes rules of decision on the federal judiciary by instructing the courts to ignore *Lampf* and select the limitations period that prevailed in the jurisdiction on June 19, 1991. *See, e.g.*, 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). Without overruling *Lampf* or *James B. Beam* or establishing a statute of limitations for Section 10(b) claims, Congress has prohibited the courts from following the holdings in those cases in adjudicating Section 10(b) claims filed before the date of those decisions and has directed the courts to apply the law existing on that date to resolve statute of limitations challenges to such claims. Congress has, thus, attempted to freeze the development of the law by "turning back the clock" to June 19 and removing from the courts the authority to select under time-honored procedures of the common law any limitations period other than the period prevailing in the jurisdiction on the date of the *Lampf* decision. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Section 476 is thus an impermissible intrusion upon the traditional common law functions of the federal courts established under Article III of the Constitution. *See generally Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1981).

The legislative history confirms that Congress enacted Section 476 with the express purpose of prescribing rules of decision for specific pending cases:

> In effect the provision in [the legislation] overrules the retroactive effect of Lampf and applies the law as it would have been applied in particular circuits the day before the Lampf decision was decided.
>
> * * *
>
> I think that we are correcting some of the most serious adverse effects the Lampf decision has wreaked upon pending cases.

178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (Statement of Sen. Bryan).

Indeed, the proponents of Section 476 proclaimed their intention to prevent dismissal of Section 10(b) claims against particular defendants. *See, e.g.*, 177 Cong. Rec. H11811 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell) (legislation "urgently needed" because *James B. Beam* has resulted in the dismissal of many Section 10(b) actions); 177 Cong. Rec. H11812 (daily ed. Nov. 26, 1991) (Statement of Rep. Markey) (supporting the legislation as necessary because "over $4 billion in fraud claims . . . are threatened with pending dismissal motions solely as a result of *Lampf* and that decision's retroactive application to every securities fraud case pending as of last summer"). The legislative history demonstrates that the driving force behind Section 476 was what its sponsors perceived to be the merits of the claims and their belief that particular defendants should be denied the repose provided by *Lampf*.[6]

Although Congress has the power to prescribe or alter rules of law of general application and even to provide that such rules shall have retroactive effect, *see Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856), Congress may not simply direct the courts to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged. It is fundamental that Congress "pass(es) the limit which separates the legislative from the judicial power" when it enacts legislation directing the rule of decision in specific pending cases. *United States* v. *Klein*, 80 U.S. 128, 146-47 (1872). This is precisely what Section 476 does. It directs the courts in a defined group of cases, i.e., those asserting Section 10(b) claims commenced on or before June 19, 1991, to follow rules of decision prescribed

---

6. *See* 177 Cong. Rec. H11812 (daily ed. Nov. 26, 1991) (Statement of Rep. Markey).

by Congress rather than rules of decision developed and enunciated by the judiciary.

The *Klein* doctrine was recently reaffirmed in *Seattle Audubon Society* v. *Robertson*, 914 F.2d 1311 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991), in which the court held that:

> [T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.

Id. at 1315. Because Section 476 does not change the limitations period applicable to Section 10(b) claims, its selective imposition of rules of decision at variance with judicially created rules is an impermissible violation of the principle of separation of powers enunciated in *Klein* and its progeny.

Plaintiff's motion to reinstate its Section 10(b) claim should be denied for the additional reason that the revival of that claim under Section 27A(b) would deprive Defendants of the right of repose resulting from the earlier dismissal with prejudice of that claim. As early as 1792, the Supreme Court made clear that "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested. . . ." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.2. Similarly, in *United States* v. *O'Grady*, 89 U.S. 641 (1875), the Supreme Court ruled unconstitutional an attempt by Congress to revise a final judgment entered by the Court of Claims, holding that such judgments "are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgment of the Court of Claims, where no appeal is taken to this court are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that Court." *Id.* at 648.

This principle — which preserves the independence of the judiciary — has been reaffirmed in a series of subsequent decisions. Following *Wheeling & Belmont Bridge* and *Klein*, the Supreme Court opined in *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), that "the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *See also Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 113 ("[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), ("[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment"). The Court of Appeals for the District of Columbia more recently recognized the same principle in *de Rodulfa* v. *United States*, 461 F.2d 1240 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). "[A] change of law does *not* retroactively affect a proceeding," the court stated, "which has already been terminated by a final judgment prior to the change." *Id.* at 1252 & n.61 (emphasis added).[7]

In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), the Supreme Court recognized that the courts could not be directed to apply a newly-enlarged statute of limitations to upset the result in an action that had been finally adjudicated by the courts. *Chase* involved the question whether it is permissible under the Fourteenth Amendment to apply

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7. Because the United States is not a party to this litigation, it cannot waive or compel Defendants to waive their *res judicata* defense to the reinstitution of plaintiff's Section 10(b) claim. *Cf. United States* v. *Sioux Nation of Indians*, 448 U.S. at 407 ("Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers").

legislation enlarging the limitations period for state blue sky claims to claims that would otherwise be time-barred. The Court specifically noted that "[a]s the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudicated so that legislative action deprived it of a final judgment in its favor." *Id.* at 310. The Court held that the mere expiration of the limitations period did not preclude application of a new statute of limitations. The Court specifically limited its holdings to cases in which there had not been a final adjudication, stating that "the existence of [a shorter limitations period] at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy *before final adjudication*." *Id.* at 316 (emphasis supplied).

Similarly, in *Bankard* v. *First Carolina Communications, Inc.*, No. 89-C-8571, 1992 WL 3694 at * 6 (N.D. Ill. Jan. 6, 1992) — the only reported decision addressing the constitutionality of Section 476 — the court specifically limited its holding to those cases in which there had not been a final adjudication.[8] The court noted that "[t]he present case has not had a final judgment entered" and, therefore, the court did "not consider if the result would be different if § 27A(b) were being invoked to reinstate a closed case." *Id.* at * 7 n.7.

The *Bankard* court's reliance on *Tonya K.* v. *Board of Education of Chicago*, 847 F.2d 1243 (7th Cir. 1988), as the sole

8. In *Bankard*, the court incorrectly concluded that Congress, in enacting Section 476, had changed the underlying law. As discussed above, Congress has not legislated a new limitations period for Section 10(b) claims or altered the period adopted in *Lampf*. Rather, Section 476 directs the federal courts to ignore *Lampf* and *James B. Beam* and apply the rules of decision prevailing in the jurisdiction on June 19, 1991. In dictating by legislative flat the resolution of statute of limitations controversies in a specific class of cases, without purporting to change the underlying law, Section 476 runs afoul of the separation of powers doctrine as construed in *United States* v. *Klein*, 80 U.S. 128.

support for its holding on the constitutionality of Section 476, further supports this distinction. In *Tonya K.*, the Seventh Circuit recognized the validity of the "vested rights" doctrine, observing that "[o]nce the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other," citing *Hodges* v. *Snyder*, 261 U.S. 600 (1923), and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). Nevertheless, the court upheld the constitutionality of the legislation because the rights of the defendants had never vested through the entry of a final judgment. Judge Easterbrook's discussion of the issue that would have been presented if the defendants' rights had vested is particularly instructive:

> If the defendants wanted to have a judgment (vested or otherwise) on which to rely, they had to secure a dismissal with prejudice in 1984. They did not, and the Constitution does not give them as a gift what they failed to secure when they had the chance.

Tonya K., 847 F.2d at 1248.

Here, by contrast, Defendants have obtained a final judgment dismissing plaintiff's Section 10(b) claim with prejudice. That judgment should have the same effect and should be entitled to the same respect as any other final judgment of an Article III court. To the extent that Section 476 purports to require reinstatement of this action, it is unconstitutional.

WHEREFORE, Defendants respectfully request that the Court deny plaintiff's motion to reinstate and award to Defendants such other and further relief as the Court may deem just and proper.

Dated: February 20, 1992

WEIL, GOTSHAL & MANGES
Morton L. Susman, Esq.
Texas Bar No. 19520000
Suite 1600
700 Louisiana
Houston, Texas 77002
Telephone: (713) 546-5000
Telecopier: (713) 224-9511

-and-

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Telecopier: (212) 310-8007

-and-

ERNST & YOUNG
Robert G. Cohen, Esq.
380 Madison Avenue
New York, New York 10017
Telephone: (212) 773-3800
Attorneys for Defendant
Ernst & Young

-and-

HUTCHESON & GRUNCY, L.L.P.
James L. Truitt, Esq.
State Bar No. 20256000
901 Main Street, Suite 6200
Dallas, Texas 75202-3714
Telephone: (214) 761-2800
Telecopier: (214) 761-2805

-and-

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL
Fletcher L. Yarbrough, Esq.
State Bar No. 22137000
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3000
Telecopier: (214) 855-1333

-and-

FULBRIGHT & JAWORSKI
1301 McKinney, Suite 1500
Houston, Texas 77010-8095
Telephone: (713) 651-5151
Telecopier: (713) 651-5246

-and-

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Attorneys for Defendant
Goldman, Sachs & Co.

-and-

FIGARI & DAVENPORT
Ernest E. Figari, Jr., Esq.
State Bar No. 06983000
901 Main Street, Suite 4800
Dallas, Texas 75202
Telephone: (214) 939-2000
Telecopier: (214) 939-2090

-and-

GIBBS & RATLIFF
1100 Louisiana, Suite 3400
Houston, Texas 77002
Telephone: (713) 650-8805
Telecopier: (713) 750-0903

-and-

DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
Telephone: (212) 530-4000
Attorneys for Defendant
Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149
Telephone: (212) 371-9200
Attorneys for Defendant
Salomon Brothers Inc

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 27th day of February, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action

No. CA3-91-0441-H

PACIFIC MUTUAL LIFE INSURANCE CO.,

Plaintiff,

v.

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY AND CO., INCORPORATED., GOLDMAN SACHS & CO., ERNST & YOUNG & CO., and SALOMON BROTHERS INC.,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REINSTATE ACTION

In their attempt to avoid reinstatement of this action, defendants Ernst & Young, Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc. (collectively referred to as "Defendants") assert that newly enacted § 27A of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aaA, is unconstitutional on two grounds. Defendants first claim that § 27A violates the separation of powers doctrine because it allegedly directs the result in "statute of limitations challenges" without changing the underlying law. Defendants then claim that § 27A deprives litigants of their vested rights and "eviscerates the principles of finality of judgment." Defendants' argument has been rejected by virtually every court save one.

As discussed more fully below, contrary to defendants' contentions, § 27A does not direct the Court to make a

particular finding of fact or decision on the merits. *James Bankard, et al.* v. *First Carolina Communication, Inc., et al.*, 1992 U.S.Dist. LEXIS 53 (N.D. Ill. January 3, 1992), (attached as Exhibit A hereto); *Ayers et al.* v. *Sutliffe, et al.*, Slip. Op. No. C-1-90-650 (S.D. Ohio February 11, 1992) (attached as Exhibit B hereto); *VenturTech II. Limited Partnership et al.* v. *Deloitte Haskins & Sells, et al.*, No. 88-1012-Civ-5-H (E.D.N.C. February 24, 1992) (attached as Exhibit C hereto). In addition, defendants' underlying premise is wrong — Congress has changed the underlying law by providing that § 10(b) claims brought on or before June 19, 1991 will be governed by the statute of limitations that existed in the applicable jurisdiction on June 19, 1991. *Id. See* 15 U.S.C. § 78aaA.

Further, defendants incorrectly claim a vested right in this case. Contrary to defendants' contentions, the has not been a final judgment entered in this case, as discussed *infra*. Further, statutes of limitations do not create vested rights. *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945). *See also VenturTech II*, No. 88-1012-Civ-5-H at 4. Accordingly, notwithstanding defendants' protestations to the contrary, Congress' enactment of Section 27A was an appropriate exercise of its legislative power.

I. SECTION 27A OF THE EXCHANGE ACT DOES NOT VIOLATE THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS

Section 27A of the Exchange Act is a lawful and constitutional exercise of Congress' power to change the law. The power to make and change the law is vested in Congress by the Constitution. U.S. Constitution, Art. 1, Sec. 1. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone.....") As such, Congress has the

"power of passing judgment on the needs of a complex society." *Polish Nat. Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944). The only limitation on this power is that posed by the Constitution. *See Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

In determining the constitutionality of a statute, it is a fundamental principle that a court "'asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . should only do so for the most compelling constitutional reasons.'" *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989), quoting *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986). The Supreme Court has repeatedly reiterated the principle that "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S.648, 657 (1895). *See e.g.*, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988) ("federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and . . . when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid."); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Blvd. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Applying these principles it becomes clear that the only proper interpretation of § 27A is that it is a lawful and constitutional exercise of Congress' legislative power. Indeed, this is the very conclusion reached by a number of courts that have considered the same separation of powers argument as that advanced by defendants. *Bankard*, 1992 U.S. Dist. LEXIS 53 at 8; *Ayers*, Slip. Op. No. C-1-90-650 at 2-5; *VenturTech II*, No. 88-1012-Civ-5-H at 2-4; *Sims et al.* v. *Shearson Lehman Brothers Inc.*, No. CA3-90-252-P (N.D. Tex.

January 29, 1992) (attached as Exhibit D hereto). These courts have all rejected the notion that § 27A directs the courts "to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged." Defendants' brief, p. 7. In fact, in *Sims*, Judge Solis summarily rejected these same arguments without even allowing the plaintiffs' to respond. See Exhibit D. *See also* defendants' reply brief in *Sims*, referenced in the January 29, 1992 Order, attached as Exhibit E hereto.

In *Bankard*, the court explained:

> Section 27A . . . does not direct the courts to make a particular factual finding or to reach a particular decision on the merits of any securities fraud claim. There is no violation of separation of powers principles . . . Defendants contend Congress cannot change the result of cases without also changing the underlying law. The merits of that argument need not be considered because the underlying premise is false. *Congress has changed the law.* It might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction.

Bankard, 1992, 1992 U.S. Dist. LEXIS 53 at 8 (citation omitted, emphasis added).

Similarly, in *VenturTech II*, the court stated:

> Congress, through [§ 27A], is not directing a particular finding of fact or decision on the merits. The new provision only prohibits the application of a new rule of law. Additionally, Congress has not attempted to change the result in certain cases without changing the underlying law. Congress changed the law by preserving the statutes of limitations applicable in § 10(b) and Rule 10b-5 cases filed prior to June 19, 1991.

VenturTech II, No. 88-1012-Civ-5-H at 3-4. *Accord Ayers*, Slip. Op. No.C-1-90-650 at 3-4 ("By enacting [§ 27A], Congress has not 'prescribe[d] a rule for the decision of a cause in a particular way.'").

Thus, as these cases make clear, § 27A is not specifically tailored to determine the outcome of this or any other case, and does not prejudge any facts. Indeed, the legislation applies to scores of cases across the country. In order for defendants' view to prevail, § 27A would have had to instruct this Court on how to resolve *this* case. That has not happened. Defendants have their defenses on the merits. They simply have those defenses as they existed on June 19, 1991.

Further, as these cases point out, Congress has changed the underlying law. Prior to the enactment of § 27A, the statute of limitations for § 10(b) actions commenced on or before June 19, 1991 was the one year/three year statute of limitations found in Section 9(e) of the Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). By enacting § 27A, Congress changed the statute of limitations for these § 10(b) actions to the limitations period that existed in the applicable jurisdiction on June 19, 1991, prior to *Lampf*.[1] Here in the Fifth

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1 § 27A provides in pertinent part:

(b) Effect on Dismissed Causes of Action. Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) *which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991*,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section. (emphasis added).

Circuit, the statute of limitations for § 10(b) actions on June 19, 1991 was the four year statute of limitations found in an analogous Texas state law. *Sioux, Ltd., Secur. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990), *citing Longden* v. *Sunderman*, 737 F. Supp. 968, 971-972 (N.D. Tex. 1990). Thus, it is clear that Congress has changed the underlying law. The fact that Congress changed the law by reference to judicially created law, including principles of retroactivity, is irrelevant. *Bankard, supra. See also VenturTech II, supra; Ayers, supra; Sims, supra.*[2]

Defendants cite two cases in support of their contention that § 27A is unconstitutional, *United States v. Klein*, 80 U.S. 128, 146-147 (1871) and *Seattle Audubon Soc.* v. *Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991). However, by defendants' own admission, neither case applies where, as here, Congress has changed the underlying substantive law.

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2 Other district courts have applied the new limitations period found in § 27A, without even addressing any constitutional issues, which further demonstrates that § 27A is a proper exercise of Congress' legislative powers. *See e.g., Ades, et al.* v. *Deloitte & Touche, et al.*, 1992 U.S. Dist. LEXIS 12 (S.D.N.Y. January 3, 1992) (attached as Exhibit F hereto); *Ahmed, et al.* v. *Trupin, et al*, 1992 U.S. Dist. LEXIS 207 (S.D.N.Y. January 10, 1992) (attached as Exhibit G hereto); *Adams Ass., et al.* v. *JEM Management Ass. Corp., et al.*, 1992 U.S. Dist. LEXIS 1283 (S.D.N.Y. February 7, 1992) (attached as Exhibit I hereto). In addition, another district court has rejected attacks on § 27A's constitutionality and will be issuing a memorandum opinion. *American Continental Corporation / Lincoln Savings and Loan Sec. Lit.*, MDL No. 834 (D. Ariz.) (See February 7, 1992 Order, p. 4, attached as Exhibit J hereto). Only one court has found § 27A to be unconstitutional, but has not yet issued a written opinion nor articulated its reasons for so finding. *In re Brichard Securities Litigation*, No. C 87-2987-Cal (N.D. Cal.).

Finally, Congress' motive for enacting § 27A is irrelevant in determining whether the statute violates the separation of powers doctrine. The Supreme Court has expressly recognized the impropriety of inquiring into Congress' motive in separation of powers cases. In *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968), the Supreme Court explained:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive...
>
> Inquiries into congressional motives or purposes are a hazardous matter .... We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser speech about it."

Accord Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (in upholding the constitutionality of a repeal of a law, Supreme Court stated "[w]e are not at liberty to inquire into the motive of the legislature. We can only examine into its power under the Constitution ...").[3]

---

3. That § 27A may be the result of "political compromise" (def. brief p. 3) is also irrelevant and has absolutely no bearing on the constitutionality of the statute. Indeed, many laws enacted by Congress are the result of "political compromise."

II. DEFENDANTS HAVE NO VESTED RIGHT IN THE COURT'S PRIOR RULING

Contrary to defendants' contentions, as of the date of § 27A's enactment, no final judgment was entered in this case. On August 15, 1991 this Court entered two orders relating to the dismissal of Plaintiff's action — a "Memorandum Opinion and Order" ("Memorandum Opinion") and an "Order Granting Leave for Defendants to Supplement Their Pending Motions to Dismiss the First Amended Complaint and Dismissing the First Amended Complaint" ("Order of Dismissal").[4] Plaintiff subsequently filed an unopposed motion to amend the Order of Dismissal to make it consistent with the Memorandum Opinion. (Attached as Exhibits K, L and M hereto are the motion and Orders). Defendants in essence joined with plaintiff in moving to amend the Order of Dismissal.

As of the date of § 27A's enactment, however, the Court had not ruled on this motion. Accordingly, no final judgment was entered in this case that could have even colorably vested any rights in defendants.

However, even assuming a final judgment had been entered on plaintiff's federal securities claim, defendants still could not have a fundamental, constitutional vested right in that ruling such that § 27A's application to plaintiff's federal claim would amount to a constitutional violation. This is because statutes of limitations do not create vested rights, but serve as arbitrary, legislative cut-offs of a plaintiff's right to pursue a

---

4 The Memorandum Opinion stated that Count I (Federal Securities Count) was dismissed with prejudice as time barred and that Count II (State Common Law Fraud claim) was dismissed *without* prejudice based upon the Court's declination to exercise pendent jurisdiction.

remedy. *Chase Secur. Corp.* v. *Donaldson*, 325 U.S. 304 (1945). *See also VenturTech II*, No. 88-1012-Civ-5-H at 4. As the Supreme Court in *Chase* observed:

> [statutes of limitation] have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right ... [litigants] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase, 325 U.S. at 314.

While defendants rely on *Chase* to support their contention that § 27A is unconstitutional, interestingly enough, *Chase* warrants the contrary conclusion.

In *Chase*, like here, there was an adjudication of only one of the plaintiff's remedies — the securities claim was found time-barred, but the common law fraud claim remained. After a final adjudication holding that plaintiff's securities claim was time-barred, the legislature enacted a new statute of limitations which by its express terms had retroactive application and which made the previously adjudicated time-barred securities claim timely.

The Supreme Court found that the revival of plaintiff's securities claim did not violate any constitutional proscription. All that it did was make an additional remedy available to the plaintiff. This was due to the fact that the plaintiff, like Pacific Mutual, had at the time the legislation was enacted, a viable common law fraud claim pending against the defendants. As a result, the revival of one additional remedy did not in the Court's mind trigger any fundamental constitutional question.

Moreover, as in *Chase*, a reinstatement of this action would not pose any special hardship for defendants. Defendants initially participated in this litigation on the assumption that plaintiff's § 10(b) claims were timely. Although *Lampf* may have given defendants the opportunity to avoid litigating the § 10(b) claims, the reinstatement of these claims presents no special hardship or unfair surprise to defendants. Indeed, as defendants well note, they are still litigating the common law fraud claim. See Def. Mem. at 3, n.4. All that § 27A does is to expand plaintiff's remedies. *See Chase*, 325 U.S. 304. *See also VenturTech II*, No. 88-1012-Civ-5-H at 4.

For all the foregoing reasons, this Court should uphold the constitutionality of § 27A.

III. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the Court to grant plaintiff's motion to reinstate this action.

Respectfully submitted,

Dated: February 28, 1992

By: _____

STEWART M. WELTMAN
Illinois State Bar No. 03122196
Carol V. Gilden
Illinois State Bar No. 06185530
MUCH SHELIST FREED
DENENBERG & AMENT P.C.
200 North LaSalle Street
Suite 2100
Chicago, Illinois 60601-1095
Telephone: 312/346-3100

Dated: March 2, 1992

LOCAL COUNSEL:
Harold E. Vanberg, Jr.
State Bar. No. 20465500
BURLESON, PATE & GIBSON
2414 North Akard
Suite 700
Dallas, Texas 75201
Telephone: 214/871-4900
FAX: 214/954-1194

By: _____

Supreme Court, U.S.
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No. 93-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

William R. Norfolk
Theodore Edelman
Timothy J. Helwick
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

Fletcher L. Yarbrough
CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Goldman, Sachs & Co.

Robert G. Cohen
Kathyrn A. Oberly
ERNST & YOUNG
380 Madison Avenue
New York, New York 10153

Morton L. Susman
WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Ernst & Young

JAMES W.B. BENKARD*
James D. Liss
Vincent T. Chang
David Rosenfeld
Arthur J. Burke
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HANNAH BERKOWITZ
New York, New York 10019

James L. Truitt
HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Morgan Stanley & Co. Incorporated

Robert B. Mazur
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171

Ernest E. Figari, Jr.
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Salomon Brothers Inc

* Counsel of Record
February 24, 1994

QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and Article III and the Fifth Amendment to the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-609

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 997 F.2d 39. *See* Appendix to Petition for a Writ of Certiorari ("Pet. App.") at A-1 to A-35. The opinion of the United States District Court for the Northern District of Texas is reported at 806 F. Supp. 108 and appears at Pet. App. B-1 to 15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1] The judgment of the Court of Appeals was entered on July 20, 1993. The Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit was filed October 18, 1993, and certiorari was granted on January 10, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article III and the Fifth Amendment to the United States Constitution. *See* Appendix A hereto.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991) (''Section 27A''), provides in pertinent part:

> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991,—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

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1. Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari. The caption includes all parties to the case below.

> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

Initial Proceedings

On March 1, 1991, Pacific Mutual Life Insurance Company (''Plaintiff'' or ''Pacific Mutual''), commenced this action alleging claims based on Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder, and common law fraud. The complaint arose out of Plaintiff's purchases in July and August 1987, on the open market, of debt instruments issued by Interfirst Corporation in 1986. Plaintiff claimed that Defendants Morgan Stanley & Co. Incorporated, Goldman, Sachs & Co., Salomon Brothers Inc and Ernst & Young (collectively, ''Defendants'' or ''Petitioners''), were liable to Plaintiff because of their alleged involvement in the 1987 merger of Interfirst and RepublicBank Corporation.

On June 20, 1991, this Court announced two decisions that together disposed of Pacific Mutual's Section 10(b) claim. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), this Court disapproved of the practice of borrowing state limitations periods in Section 10(b) cases and applied a uniform federal limitations period of one year from discovery of the facts constituting the alleged violation and, in any event, not later than three years after such alleged violation. *Id.* at 2782. This Court applied this limitations period to the claims of the plaintiffs in *Lampf* and dismissed their claim as untimely. On the same day, in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that a principle of law that is applied retroactively to the parties in the case before the Court must also be applied to all similarly situated parties in all other pending proceedings where such application

is not barred by procedural requirements or final judgments. *See Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993).

Applying the holdings of this Court in *Lampf* and *Beam*, in a Memorandum Opinion and Order dated August 15, 1991, the District Court (Sanders, C.J.) dismissed with prejudice Pacific Mutual's Section 10(b) claim as time-barred and dismissed without prejudice its pendent state law claims. On August 16, 1991, the District Court's Order was entered as a final judgment pursuant to Fed. R. Civ. P. 58 and 79(a). Respondent did not appeal from that Order and the time for an appeal expired.

Enactment of Section 27A

In reaction to *Lampf* and *Beam*, proposals to replace the "one-year/three-year" limitations period with a longer statute of limitations were quickly introduced in Congress, but no such legislation was passed.[2] Instead, a political compromise was reached to undo the retroactive effect of *Lampf*. The new statute, addressing only cases pending at the time *Lampf* was decided, was enacted into law on December 19, 1991, four months after the dismissal of plaintiff's action. That law, codified as Section 27A of the Exchange Act, directs the courts to disregard *Lampf* in any private civil action commenced on or before June 19, 1991 (the day before the rulings in *Lampf* and *Beam* were announced). The law also mandates that limitations rules pre-dating *Lampf* be applied even to those actions, such as

2 Two such proposals would have replaced the *Lampf* statute of limitations with longer limitations periods. *See* 137 Cong. Rec. S10,675-76, S10,691-92 (daily ed. July 23, 1991) (statements of Sen. Bryan and Sen. Riegle) (2-and-5-year period); *id.* at H6316 (daily ed. Aug. 1, 1991) (3-and-5-year period). Neither reached the Senate or House floors.

this case, that had previously been dismissed by a final judgment no longer subject to appeal.

The legislative history is replete with complaints by the sponsors of § 27A that this Court's ruling in *Lampf* was "ill-considered"[3] and a "mistake," as well as alarming predictions that retroactive application of *Lampf* would allow notorious miscreants to escape liability.[4] Section 27A therefore was intended to accomplish a "legal reachback"[5] that would eliminate the retroactive effect of *Lampf*, and direct courts to apply a pre-existing rule of decision even in closed cases.

Section 27A has no effect on the statute of limitations to be applied in future cases, or in cases that were filed after *Lampf* but before § 27A was enacted; for those cases, *Lampf* still applies. As Senator Domenici explained, "we resolved [that] issue by *not* extending the statute of limitations on 10(b) type of litigation." 137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici) (emphasis added).

However, Section 27A(b) directs the federal courts to reinstate any action brought under Section 10(b) on or before June 19, 1991, and dismissed on limitations grounds after June 19, 1991, if (i) the plaintiff files a motion to reinstate the action within sixty (60) days from the effective date of the statute and (ii) the court determines, without reference to this Court's holdings in *Lampf* and *Beam*, that under the law existing as of June 19, 1991, the action would not have been time-barred.[6] By

3 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey).

4 137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

5 137 Cong. Rec. S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle).

6 In theory, if any federal court should determine that the law of its jurisdiction on June 19, 1991 was that announced by this Court in *Lampf* and *Beam*, it would be required to deny reinstatement. The court would be

enacting Section 27A(b), Congress legislatively reversed *Beam* as it applied to *Lampf* and directed each lower court to apply "its own" pre-*Lampf* law.

The Decisions Below

On January 31, 1992, more than six months after the final dismissal of its action, Plaintiff filed a motion to reinstate its case pursuant to Section 27A(b). In an Opinion dated July 13, 1992, the District Court denied the motion to reinstate, holding that Section 27A(b) is unconstitutional for several of the same reasons later advanced by the Sixth and Tenth Circuits in *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993), and *Johnston* v. *Cigna Corp.*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993).

The District Court found that Section 27A(b) "violates established separation of powers principles," 806 F. Supp. at 112; Pet. App. at B-6, and that a "small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion." *Id.* at 113; Pet. App. at B-10.

The District Court held further that Section 27A(b) had nullified "the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants." *Id.* at 112; Pet. App. at B-7. The District Court relied on a long line of precedents including *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), and *McCullough* v. *Virginia*, 172 U.S. 102 (1898).

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barred, however, from looking to those decisions for guidance. Accordingly, the effect, if not the intent, of Section 27A(b) was to eliminate *Lampf* and *Beam* as precedent for dismissed Section 10(b) actions, not necessarily to achieve the reinstatement of those actions.

On July 20, 1993, the Fifth Circuit reversed the District Court's order and found Section 27A(b) constitutional. While the court acknowledged that "[e]ach of the defendants in these cases . . . possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims" (997 F.2d at 46; Pet. App. at A-14), the court held that "judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation." *Id.* at 49; Pet. App. at A-21. The Court recognized that *McCullough* v. *Virginia* stood in the way of any such holding but simply refused to follow that authority, opining that this Court has supposedly "never applied . . . *McCullough* to decide another case" (*id.* at 46; Pet. App. at A-15) and has thus "retreated" from *McCullough*, *sub silentio*. *Id.* at 47; Pet. App. at A-17.[7]

The Fifth Circuit declined to "state general rules as to when the Due Process Clause permits Congress to disturb judgments." *Id.* at 49; Pet. App. at A-21. However, the court went on to hold that a private party's rights in a judgment may be nullified simply by showing that the legislature acted rationally toward the party asserting a due process violation. *Id.* at 50; Pet. App. at A-23.

In a very short section of its opinion, the court brushed aside the contention that Section 27A(b) violates the separation of powers doctrine. While the Fifth Circuit explicitly recognized that legislation reversing the results in particular controversies between private individuals is "violative of our authority to decide cases," *id.* at 54; Pet. App. at A-32, it nevertheless decided that Section 27A(b) "is innocent on this score" because it "leaves the final resolution of securities fraud

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7. For this proposition, the court cited *Fleming* v. *Rhodes*, 331 U.S. 100 (1947) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

disputes to the courts — we will decide . . . which controversies will end in dismissal despite Section 27A(b).'' *Id.*

Accordingly, the Fifth Circuit concluded that Section 27A(b) was ''harmless'' under separation of powers analysis because ''[b]y upsetting final judgments, Section 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done.'' In short, the court held that Congress could reverse a final judgment in order to give the plaintiff another day in court. *Id.* at 54; Pet. App. at A-32. In support of this novel proposition, the court relied on *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), neither of which involved a legislative attempt to overturn a final judgment between private parties. Strikingly, the Fifth Circuit did not mention, much less distinguish, this Court's landmark decision in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

The Decisions of the Other Lower Courts

The Fifth Circuit's decision was the first Court of Appeals opinion squarely deciding the constitutionality of Section 27A(b) as applied to final judgments.[8] All three of the circuits that have subsequently addressed the issue have disagreed with *Pacific Mutual* — the Sixth and Tenth Circuits in holdings and the Second Circuit in dictum.[9]

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8. A number of circuits have decided that Section 27A(a), which applies to pending cases, does not violate the Constitution. *See, e.g., Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) (collecting cases).

9. *See Johnston*, 1993 WL at 500842; *Plaut*, 1 F.3d at 1487; *Axel Johnson Inc.*, 6 F.3d at 83 (finding defendant had no final judgment, but reaffirming the ''constitutional bar to the legislative nullification of a judgment'').

Prior to the Fifth Circuit's opinion, one Circuit had questioned the constitutionality of this legislative nullification of final judgments.[10] Similarly, the majority of district courts that have considered the constitutionality of Section 27A(b) as applied to final judgments have also found it to be unconstitutional,[11] as have a number of academic commentators.[12]

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10. *Cooperativa de Ahorro y Credito Aquada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993), *cert. pet. filed*, 62 U.S.L.W. 3299 (Oct. 12, 1993) (rejecting constitutional challenge to Section 27A(b) because no final judgment had been entered, but recognizing that ''a final, unreviewable judgment'' is a property right) (citing *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986)).

11. *See Armijo* v. *E.F. Hutton & Co.*, No. Civ. 90-1064 JC, slip op. at 4-5 (D.N.M. Aug. 17, 1992) (holding § 27A(b) unconstitutional); *Dulude* v. *CIGNA Sec. Corp.*, 1992 WL 281411, at *2 (E.D. Mich. May 15, 1992) (same); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1059 (E.D. Mich. 1992) (same); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992) (same), *aff'd*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993); *Plaut* v. *Spendthrift Farms, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993); *see also In re Rospatch Sec. Litig.*, 802 F. Supp. 110, 114 (W.D. Mich. 1992) (dictum); *but see Brown* v. *The Hutton Group*, 795 F. Supp. 1307, 1315-17 (S.D.N.Y. 1992) (holding § 27A(b) constitutional before the Second Circuit's opinion in *Axel Johnson* and questioned in *Rabin* v. *Fivzar Assoc.*, 801 F. Supp. 1045, 1056 n.11 (S.D.N.Y. 1992)); *Casserly* v. *Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. at 5-9 (D. Minn. July 2, 1992).

12. Fisch, *As Time Goes By: New Questions About the Statute of Limitations For Rule 10b-5*, 61 Fordham L. Rev. S 101, S 119 n.121 (1993) (stating that Section 27A(b) ''interferes with the defendant's vested rights''); Palm, *The Constitutionality of Section 27A of the Securities Exchange Act: Is Congress Rubbing* Lampf *The Wrong Way?* 37 Villanova L. Rev. 1213, 1290-91 (1992) (same); Note, *When the Supreme Court Shuts its Doors, May Congress Reopen Them?: Separation of Powers Challenges to § 27A of the Securities Exchange Act*, 34 B.C.L. Rev. 853, 895 (1993) (same); Note, *Section 27A of the SEA: An Unplugged* Lampf *Sheds no Constitutional Light*, 78 Minn. L. Rev. 197, 223 (1993) (Section 27A(b) ''impinges on the structural requirement of separated powers and compromises heightened due process rights'').

SUMMARY OF ARGUMENT

For more than 200 years, it has been settled law that Congress may not strip a private litigant of the vested right to a final judgment rendered by a court of the United States. This principle is based on the separation of powers and due process doctrines that are as old as the Republic itself.

The Fifth Circuit Court of Appeals has now breached this founding principle, brushing aside binding precedent of this Court as well as numerous decisions of other federal tribunals, and held that Section 27A(b) may resurrect a claim that had been finally dismissed and as to which the time to appeal had expired.

The Sixth and Tenth Circuit Courts of Appeals reached the opposite result on the same statute. Analyzing the same issue and the same cases, those courts explicitly rejected the holding of the Fifth Circuit and determined that Section 27A(b) is "an unconstitutional usurpation of the judiciary power." *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487, 1499 (6th Cir. 1993); *see Johnston* v. *Cigna Corp.*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993) (the bar against retroactive legislative nullification of final judgments "remains as alive today as it was when our nation was founded"). We submit that the Sixth and Tenth Circuits are correct and that Section 27A(b) is a dangerous and impermissible attempt by the legislature to undermine the essential function of the courts.

ARGUMENT

I. SECTION 27A(b) VIOLATES THE PRINCIPLE IN *HAYBURN'S CASE* AND THE SEPARATION OF POWERS DOCTRINE.

The principle that the legislature may not modify or reverse the final judgment of an Article III court derives from the command of Article III that "the judicial Power of the United States, shall be vested" in the courts, Art. III, § 1, and not in the legislature "in whom no judicial power of any kind appears to be vested . . . ." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 413 n.2 (1792). "Since 1792, the federal courts have emphasized finality of judgments as an essential attribute of judicial power."[13] The enactment of Section 27A(b) transgresses not only the precedents of this Court but also the principles of our constitutional system. Because the judiciary consistently rejects such infringements, the Tenth Circuit observed that, other than the Fifth Circuit's opinion below, "we cannot locate a single case where a court has upheld an attempt by Congress to upset a final, nonappealable judgment in a case between private parties." *Johnston*, 1993 WL 500842, at *9; *see Plaut*, 1 F.3d at 1493.

The Constitution "mandates" that each branch of government remain "entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (quoting *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935)). Even in situations where "no immediate threat to liberty is apparent," it remains "one of the most vital functions

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13 The Constitution of the United States of America: Analysis and Interpretation 633 (Cong. Research Serv., Killian and Beck Eds. 1987).

of this Court to police with care the separation of the governing powers." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

The infringement of separation of powers that Section 27A(b) represents — the overreaching of the legislature — was of particular concern to those who debated and created the Constitution. In particular, "the debates of the Constitutional Convention and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley* v. *Valeo*, 424 U.S. 1, 129 & n.166 (1976). Because "the legislative authority, necessarily, predominates," *The Federalist* No. 51, at 350 (J. Cooke ed. 1961) (Madison), it was "the profound conviction of the Framers" that legislative power was "to be most carefully circumscribed." *INS* v. *Chadha*, 462 U.S. 919, 947 (1983).[14]

Therefore, Alexander Hamilton, among others, stressed that "all possible care is requisite" to enable the judiciary, "the least dangerous" branch, to "defend itself against [legislative] attacks." *The Federalist* No. 78, at 522-23 (Hamilton). *See Bowsher* v. *Synar*, 478 U.S. 714, 725 (1986). "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for *the judge* would then be *the legislator*." *The Federalist* No. 47, at 329-30 (Madison) (emphasis in original).[15] Accordingly, it is for this

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14. *See also Mistretta*, 488 U.S. at 361 ("[T]he Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power . . . ."); *Johnston*, 1993 WL 500842, at *8 (quoting *The Federalist* No. 48, at 334 (Madison) (the legislature "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes.")). For a cogent exposition of the historical background of Article III, see the majority opinion of Judge Batchelder in *Plaut*, 1 F.3d at 1490-1492.

15. "A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from domination by other branches of government." *Northern Pipeline*

Court to insure "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch' "[16] and to invalidate legislative "inroads into functions that have traditionally been performed by the judiciary." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (Opinion of Brennan, J.).[17]

A. The Separation of Powers Doctrine Bars Legislative Efforts to Vacate Final Judgments.

No one disputes that Section 27A(b) specifically allows the reopening of final decisions of Article III courts. As such, the statute impermissibly intrudes on the judicial Power, a result prohibited by the constitutional framework and this Court's decisions spanning more than 200 years. The invalidation of final judgments by Section 27A(b) strikes at the very heart of the judicial Power, and threatens not only the end product of the judicial process — final judgments — but, by implication, all of the subsidiary functions and decisions of the Judiciary.

Over a century ago, the Supreme Judicial Court of Massachusetts noted the historical antecedents for the barrier

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Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (Opinion of Brennan, J.) (quoting *United States* v. *Will*, 449 U.S. 200, 217-18 (1980)).

16. *Mistretta*, 488 U.S. at 383 (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986)).

17. To "forestall the danger of encroachment 'beyond the legislative sphere,' " this Court has "not hesitated to invalidate provisions of law that violate this principle." *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310-11 (1991) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928), and *Morrison* v. *Olson*, 487 U.S. 654, 693 (1988)); *Buckley*, 424 U.S. at 121 (separation of powers a "vital check against tyranny").

between legislation and final judgments:

> Lord Coke calls judgment and execution the "fruit of the law." To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential prerogative. It could then no longer finally adjudicate and determine the rights of litigants. The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. . . . Indeed it is difficult to see how the legislature could more palpably invade the judicial department and effectually usurp its functions.[18]

Denny v. *Mattoon*, 2 Allen (Mass.) 361, 379 (1861).

In the end, the wealth of constitutional history establishes that one of the purposes of Article III was to proscribe legislative efforts to undermine final judgments. The Constitutional Convention was presented with, but did not adopt, a proposal from Charles Pinckney of South Carolina that would have permitted legislative revision of court decisions by establishing the Congress as the "last Resort on Appeal in Disputes between two or more States." 1 M. Jensen, The Documentary History of the Ratification of the Constitution 246-47 (1976). This proposal was rejected. Contemporary commentators emphasized the value of judicial finality: "[T]he federal judiciary should

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18. The "power of 'finality of decision' " is one of the "inherent" attributes of judicial power: "when a court of the United States is entrusted with the determination of any question *whether* of law or of fact, its decision of such question cannot constitutionally be made reviewable except by a higher *court*, that is, cannot be made reviewable by either of the other two departments." H. Chace & C. Ducat, Corwin's The Constitution and What it Means Today 204-05 (14th ed. 1978) (citing *Hayburn's Case*) (emphasis in original).

have power co-extensive with the federal legislature — that is the power of deciding *finally* on the laws of the union." Lee, *Letters of a Federal Farmer* (Oct. 1787) in Pamphlets on the Const. of the United States 279, 306-07 (P. Ford ed. 1968) (emphasis added).[19] Indeed, James Madison specifically criticized the practice of Pennsylvania's legislature in which "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." *The Federalist* No. 48, at 337 (Madison). As Alexander Hamilton wrote: "A legislature without exceeding its province cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." *The Federalist* No. 81, at 545 (Hamilton).[20]

The federal courts first applied this principle and "enforced" Article III in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). In that case, the Justices of the Supreme Court, sitting as circuit judges, addressed a statute that granted the federal courts the initial authority to determine the eligibility and amount of pensions for Revolutionary War veterans. The opinions of the Justices of the Court stated that the statute was unconstitutional because it permitted the Secretary of War to review the decisions of the courts and to transmit his opinion to Congress for

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19. In the same vein, the Constitutional Convention rejected a motion requiring that "the Judicial power shall be exercised in such manner as the Legislature shall direct." 1 J. Goebel, History of the Supreme Court of the United States 243 n.228 (1971) (quoting 2 M. Farrand, Records of the Federal Convention of 1787 431 (1911)). As one commentator has noted, "[a] clearer rejection of congressional authority over judicial power is hard to imagine." Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest For the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 791 (1984).

20. *See also id.* at 121 ("[T]here is a [great] absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge").

its approval. In ruling that this process violated the separation of powers principle, Justice Iredell wrote: "No decision of any court of the United States can under any circumstances in our opinion agreeable to the Constitution be liable to a revision or even suspension by the Legislature itself, in whom no judicial power of any kind appears to be vested . . . ." *Id.* at 413 n.2. Chief Justice Jay and Justice Cushing added that the legislature cannot "sit as a court of errors." *Id.* at 410 n.2.[21]

This absolute mandate "remains as alive today as it was when our nation was founded" (*Johnston*, 1993 WL 500842, at *10) and, in its light, Section 27A(b) cannot survive. This Court has consistently adhered to the principle stated in *Hayburn's Case* (*see Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988)), and each such reaffirmation directly mandates the invalidation of Section 27A(b).

While *Hayburn's Case* and its progeny are generally used to strike down statutes that provide for potential legislative or executive review of the future judgments of a tribunal, Section

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21. In footnote 2 to the dismissal on mootness grounds in *Hayburn's Case*, the justices and district judges sitting on the New York, Pennsylvania and North Carolina circuit court panels stated their views on separation of power principles. Those judges considered the law unconstitutional because of the "primary principle of the utmost importance that no decision of the Judiciary Department should under any pretext be brought in revision before either the Legislative or Executive Departments of government." 1 C. Warren, The Supreme Court in United States History 72 (Rev. ed. 1937) (quoting American Daily Advertiser (April 16, 1792)). *See also* J. Nowak & R. Rotunda, Constitutional Law 71 (4th ed. 1991); Bloch, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 592-93 (1989); D. Currie, The Constitution in the Supreme Court 311, n.173 (1984); C. Wright, The Law of Federal Courts 57-58 (4th ed. 1983); Spann, *Expository Justice*, 131 U. Pa. L. Rev. 585, 610 n.94 (1983) (*Hayburn's Case* prohibits the judiciary from taking actions "subject to revision by the executive").

27A(b) represents an even greater intrusion on the role and right of the judiciary. Unlike the legislation in *Hayburn's Case*, which merely *permitted* executive review of court pension decisions, Section 27A(b) *mandates* the automatic resuscitation of final judgments in a class of cases singled out by Congress, upon application by the interested party.

As early as 1851, this Court reaffirmed *Hayburn's Case* and its core holding: that "when the [judicial] decision was subject to the revision of a Secretary and of Congress, [it] could not be executed by the court as a judicial power." *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 50 (1851) (involving an award of damages claimed under treaty, subject to discretionary payment by the executive branch). Similarly, in *Gordon* v. *United States*, 117 U.S. 697, 703 (decided 1864, Opinion printed in Appendix 1885), this Court followed the principle that final judgments are not subject to legislative or executive revision, noting that this tenet "was decided by the Court as long ago as 1792 in *Hayburn's Case* . . . and the decision has ever since been regarded as a constitutional law." *Id.* at 703. This was also the holding of *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874), where the Court stated again: "[I]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of . . . any other department of the government." *Id.* (citing *Gordon*).

In the decade between 1890 and the turn of the century, this Court upheld the principles of *Hayburn's Case* and *Gordon* on several occasions. In *United States* v. *Waters*, 133 U.S. 208, 213 (1890), this Court ruled that a judicial award of payment to a district attorney could not be "subject to the re-examination and reversal of the Attorney General." *Id.* (citing *Hayburn's Case*). Three years later, in *In re Sanborn*, 148 U.S. 222, 224 (1893), and *Interstate Commerce Comm'n* v. *Brimson*, 154 U.S. 447, 484 (1894), this Court restated the rule that judgments subject to extra-judicial revision are inconsistent with the judicial Power. *See also La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 456-57 (1899) (adhering to *Gordon* but

finding no violation of Article III because judgment provided for final determination not subject to further review).

In *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901), this Court applied *Gordon* in holding that a decision that could only be enforced if the "Congress should at some future time sanction it," would not be "the exercise of judicial power." *Id.* at 65-66.[22] Accordingly, in *Williams* v. *United States*, 289 U.S. 553, 564 (1933), this Court noted that *Gordon* forbids a court from expressing an opinion where "its judgment would not be final and conclusive" — a rule that had met with "uniform approval." *Id.* at 564. And in *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 & n.29 (1934), this Court confirmed that the courts may not "give or review judgments" that are "conditioned" on the revisory power of an agency.

The long line of decisions was extended in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113-14 (1948), in which this Court relied on *Hayburn's Case* in denying judicial review of an order of the Civil Aeronautics Board because the governing statute subjected that order to discretionary review by the President. In so deciding, this Court confirmed the principle that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." This was also the reasoning in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), which made clear that jurisdictional statutes that "subject the decisions called for from these courts to an extrajudicial revisory authority" are "incompatible with the limitations upon judicial power this Court has drawn from Article III." *Id.* at 582 (citing *Hayburn's Case*).

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22. *See also Muskrat* v. *United States*, 219 U.S. 346, 354 (1911) ("the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated [in *Gordon*] with great learning and fullness").

Although it permitted the reopening of a judgment in favor of the government based on the government's power to waive the *res judicata* effect of a decision in its favor, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), did not disturb the line of precedent concerning private parties, dating back to *Hayburn's Case*. Instead, it made clear that, outside of the limited context of judgments in favor of the government, "legislative review of a judicial decision would interfere with the independent functions of the Judiciary." *Sioux Nation*, 448 U.S. at 392 (citing *Hayburn's Case*). *See* p. 24-25, *infra*.

Even more recently, this Court has reaffirmed the principle that legislative or executive "revisory authority over the Court is inconsistent with its exercise of judicial power." *United States* v. *Mitchell*, 463 U.S. 206, 213 n.12 (1983). In *Mistretta*, this Court sustained the constitutionality of the United States Sentencing Commission, but took pains to note that "'neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others.'" 488 U.S. at 409 (quoting *The Federalist* No. 48, at 332).[23]

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23. In addition to the Section 27A cases (*see* p. 9 n. 11, *supra*), the lower courts have upheld this principle with respect to a variety of other statutes. *See Town of Deerfield, N.Y.* v. *FCC*, 992 F.2d 420, 427-28 (2d Cir. 1993); *Central States, Southeast & Southwest Areas Pension Fund* v. *Lady Baltimore Foods*, 960 F.2d 1339, 1345 (7th Cir. 1992) (if legislation had been enacted after final judgment entered, it may have "invade[d] the judicial power of the United States"), *cert. denied*, 113 S. Ct. 179 (1992); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. ex rel. Diane K.* v. *Board of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("once a court has disposed of a case, Congress may not dictate a different decision"); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57-58 (1st Cir. 1987) (following *Hayburn's Case*); *Humana Hosp. Corp., Inc.* v. *Blankenbaker*, 734 F.2d 328, 332-33 (7th Cir. 1984) ("no decision of a federal court may be reviewed by the legislative branch"); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974) ("superior legislative review" of judicial decisions is forbidden); *De Rodulfa* v. *United States*, 461 F.2d 1240, 1252 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972); *Adams* v. *Fidelity and Cas. Co. of N.Y.*, 147 F.R.D. 265, 269 (S.D. Fla. 1993); *Craig* v.

B. The Legislature May Not "Share" the Judicial Power To Issue Final Decisions.

As noted earlier, the Fifth Circuit did not even seek to address, let alone distinguish, *Hayburn's Case* and the scores of cases which have applied the constitutional principle that plainly establishes the invalidity of Section 27A(b). Instead, the Fifth Circuit sought to minimize § 27A(b)'s intrusion on the judicial Power as "harmless" because the statute "at most denies us some authority to say when a controversy is over." 997 F.2d at 54; Pet. App. at A-32. Even though Section 27A(b) *requires* the courts to reopen cases, the Fifth Circuit asserted that the statute calls for a mere "shar[ing]" of authority between Congress and the federal courts because the legislation does not direct the results in particular controversies between private individuals; rather it "leaves the final resolution of securities-fraud disputes to the courts." *Id.*

But there is no "sharing" exception to the separation of powers principle. Article III provides in simple, straightforward words that judicial Power is vested in the courts — not part of that power, but all of it. *See Martin* v. *Hunter's Lessee*,

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Ohio Dep't of Admin. Servs., 790 F. Supp. 758, 771 (S.D. Ohio 1992) ("rewrit[ing] of judicial decisions" forbidden by Article III); *United States* v. *Bogle*, 689 F. Supp. 1121, 1147 (S.D. Fla. 1988) ("the constitutional problems of having legislative and executive review of a judicial decision appear obvious"); *United States* v. *Board of Educ. of the City of Chicago*, 588 F. Supp. 132, 235 (N.D. Ill.), *vacated on other grounds*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981) (Congress may not "negate, disregard or nullify the judgment of the Court already rendered"); *Cerro Metal Prods.* v. *Marshall*, 467 F. Supp. 869, 877-78 (E.D. Pa. 1979) (separation of powers bars an act of Congress which pronounces that "what had theretofore been judicially declared as law 'shall be deemed never to have had effect' "), *aff'd*, 620 F.2d 964 (3d Cir. 1980).

14 U.S. (1 Wheat) 304, 330 (1816) ("whole judicial power" must be vested in judiciary); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (same). The judicial Power "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress can share with the Judiciary the power to override a Presidential veto." *United States* v. *Nixon*, 418 U.S. 683, 704 (1974). *See also Chadha*, 462 U.S. at 958-59 ("sharing" with the Executive by Congress of authority over aliens is impermissible even if efficiency would be promoted). This Court has never suggested that the judicial Power to render final decisions in particular cases and controversies — the irreducible minimum of the power to decide cases and controversies — may constitutionally be "shared." *See* pp. 13-19, *supra*.

1. The Rule of *The Schooner Peggy* Recognizing the Legislative Power to Affect Pending Cases Does Not Undermine the Protection Accorded Final Judgments.

In reaching its unique ruling approving "shar[ing]" of judicial power, the Fifth Circuit relied primarily upon *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and its progeny,[24] and *Sioux Nation*, 448 U.S. at 371. Turning first to *The Schooner Peggy*, that case only applies to the application of new law in *pending* matters — not in *closed* cases in which a final judgment has been entered. Indeed, most of *The Schooner Peggy* opinion is designed to demonstrate that the 1801 peace treaty with France (which essentially negated the decision of the lower court) became law *prior* to this Court's decision on the appeal. As such, the case stands only for the proposition —

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[24] *E.g.*, *149 Madison Ave. Corp.* v. *Asselta*, 331 U.S. 795, *modifying* 331 U.S. 199 (1947).

irrelevant to this appeal — that an appellate court must ordinarily apply existing law when it considers an appeal. *See Johnston*, 1993 WL 500842, at *9 & n.11 (*The Schooner Peggy* does not support the "Fifth Circuit's sweeping statement"; *The Schooner Peggy* "judgment was not yet final at the time the law changed"). This principle simply does not address, much less call into question, the rule in *Hayburn's Case*:

> Although we agree that the two branches share such authority while a case is still pending, Congress's authority to say when a controversy is over ends when the case's journey through the courts comes to an end. *See Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) (statutes of limitations "have always been held to be within the legislative power *until the bar is complete*").

Johnston, 1993 WL 500842, at *9 & n.11 (emphasis added).

Accordingly, in numerous decisions following *The Schooner Peggy*, this Court has refused to permit extra-judicial revision of truly final judgments. *See* pp. 13-19, *supra*. No court, until the Fifth Circuit decision below, had ever applied *The Schooner Peggy* to avoid this well-settled rule.

While the Congress may change the law that the courts apply to pending cases, and *The Schooner Peggy* generally instructs the courts to "obey" such a change in law provided such a change comes "before the decision of the appellate court," 5 U.S. (1 Cranch) at 110, this principle does not apply to closed cases. Once a judgment becomes final and non-appealable, the case is over and the court divests itself of jurisdiction. Neither the court nor the litigants can be forced to "obey" the reopening of the action by the legislature. Unlike a change in law applicable to pending and future cases, which is inherently "legislative" in nature, the enactment of a statute such as Section 27A(b) for the sole purpose of reopening closed cases between private parties is a judicial — not legislative — function beyond the purview of Congress. *See* p. 27 & n. 30, *infra*.

As such, this Court should reject the notion that legislative power over pending cases legitimizes legislative attempts to reopen closed cases in which the courts have fully, and finally, exercised the judicial Power. This Court has consistently decided that "the authority — and the responsibility — to make an informed final determination" must "remain[ ] with the judge."[25] An erosion of this principle to allow the legislature to reverse final judgments, but "permit" the courts to make another, final resolution, would expose the judiciary and the public to the very same state of affairs that led to the passage of Article III. No judgment would be final — any disappointed litigant with the requisite wit, will, and resources could importune the legislature to "give him one more chance." "Sharing" would become "ceding," in short order.

Additionally, the legislative reopening countenanced by the Fifth Circuit would render a court decision "advisory." Such a result could not be reconciled with "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & Southern Air Lines*, 333 U.S. at 113-14; *Gordon*, 117 U.S. at 705; *Town of Deerfield, N.Y.* v. *FCC*, 992 F.2d 420, 428 (2d Cir. 1993). *See also Sioux Nation*, 448 U.S. at 391-92. Indeed, if this Court authorizes Congressional reopening and reversal of final judgments, that decision would mean that *all* future judgments of the Article III courts could be reduced to advisory opinions subject to possible legislative revision.[26]

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25. *Northern Pipeline*, 458 U.S. at 81 (opinion of Brennan, J.) (quoting *United States* v. *Raddatz*, 447 U.S. 667, 682 (1980)); *Northern Pipeline*, 458 U.S. at 86 n.38 (opinion of Brennan, J.) (power to issue an award of execution of a judgment is an "essential part" of the judicial power) (quoting *Brimson*, 154 U.S. at 484 (quoting *Gordon*, 117 U.S. at 702)).

26. And such a threat, even if unexercised, intrudes on the separation of powers. *See Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2306 n.13 ("[T]he threat of veto hangs over the Board of Directors like the sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions.").

2. The *Sioux Nation* Decision Permitting Government to Waive the Defense of Res Judicata Is Irrelevant to this Proceeding.

The Fifth Circuit also relied on *Sioux Nation*, 448 U.S. at 371, in attempted support of its holding that "the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done." 997 F.2d at 54; Pet. App. at A-31. *Sioux Nation* does not remotely support this proposition in an action involving private parties.

In *Sioux Nation*, this Court upheld legislation that permitted plaintiffs to assert claims against the United States without regard to prior judgments that the Court of Claims and the Supreme Court had rendered in favor of the Government. The Court held that any separation of powers objections were defeated by the "dispositive" principle that the "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 397 (citing *United States* v. *Cherokee Nation*, 270 U.S. 476, 486 (1926)). This principle rests upon "a distinct and specifically enumerated constitutional power of Congress," *Plaut*, 1 F.3d at 1496, the "constitutional power of Congress to define and 'to pay the Debts . . . of the United States.' " *Sioux Nation*, 448 U.S. at 397 (quoting Art. I, § 8, cl. 1).[27]

However, outside of this limited context, the Court in *Sioux Nation* reaffirmed the rule in *Hayburn's Case* that "legislative

27. *See Johnston* v. *Cigna*, 1993 WL 500842, at *9 n.10 (10th Cir. 1993) (the general rule barring reversal of final judgments does not apply to judgments "entered in the government's favor on a claim against the government"); *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 811 (*Sioux Nation* permits Congress "to waive the preclusive effect of a judgment that the United States is without a certain obligation"); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1106 n.8 (N.D. Cal. 1992) (same).

review of a judicial decision would interfere with the independent functions of the Judiciary," 448 U.S. at 392, and that "a legislative direction to a court to find a judgment in a certain way would be little more than a judgment rendered directly by Congress." *Id.* at 398 (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1866)). Justice Rehnquist also noted in his dissent: "as the Court apparently concedes, Congress may not . . . review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case." *Id.* at 429 (Rehnquist, J., dissenting).

C. The Legislature May Not Reopen Final Judgments In Order to Interpose New Law.

Although the Fifth Circuit did not address the issue, both plaintiff and the Government argued below that *Hayburn's Case*, 2 U.S. (2 Dall.) at 408, *O'Grady*, 89 U.S. at 641, and *Chicago & Southern Air Lines*, 333 U.S. at 103, are distinguishable from the instant case because they did not involve the application of "new law" passed by Congress. The passage of new law, it is asserted, is inherently "legislative" and, thus, in enacting Section 27A(b) Congress purportedly did not sit as "court of errors," as *Hayburn's Case* forbids.

While these three cases did not involve the passage of new legislation, their holdings — that another branch of the government could not revise or suspend the final judgment of an Article III Court — did not depend in the slightest on whether "new" law reversed the final judgment in question.[28] Indeed,

28. It should be noted, however, that Thomas Jefferson believed that the most insidious intrusions on the judicial power would be in the guise of *new* legislation: If "the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy." *United States* v. *Brown*, 381 U.S. 437, 446 n.20 (1965) (quoting Jefferson, Notes on the State of Virginia 157-58 (Ford ed. 1894)).

because the Congress acts primarily through legislation, *Chadha*, 462 U.S. at 945-46, the proper focus must be upon the impact of the legislation on the judiciary. A legislative decision to void a final judgment through new law designed for that purpose is just as violative of Article III, if not more so, as the executive revisions of final judgments using existing legislation in *Hayburn's Case*, *O'Grady* and *Chicago & Southern Air Lines*. Thus, the lower courts have never accepted the proposition that, by enacting "new law," Congress may eviscerate final judgments.[29]

In any event, even if one were to entertain the possibility that "new law" may be interposed to reopen final judgments, Section 27A(b) is not "legislative" in any meaningful sense. This Court has never before been confronted with a statute, such as Section 27A(b), that has *no prospective* effect whatsoever on future cases and only retroactively affects closed and dismissed cases. Stated bluntly, Section 27(A)(b) had only one purpose:

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29. *See Central States Pension Fund*, 960 F.2d at 1345 (passage of new law would have had separation of powers implications if it had been enacted after a final judgment had been entered); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (discussing a private bill intended to resurrect dismissed claims; legislation overturning final judgment would violate "the principle of separation of powers"); *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810 (separation of powers "protects judicial action from superior legislature review"; mandating narrow construction of new law, 20 U.S.C. § 1415, retroactively divesting court of jurisdiction); *Tonya K.*, 847 F.2d at 1247-48 (separation of powers would be violated if new law, 20 U.S.C. § 1415(e), had been construed as overturning final judgments); *Daylo*, 501 F.2d at 815 ("independence of the judicial branch" would be impaired if new law, 38 U.S.C. § 211(a) and 3111, had been construed to overturn final judgment); *De Rodulfa*, 461 F.2d at 1252 (construing legislation to avoid separation of powers issues, notwithstanding passage of new legislation, 38 U.S.C. § 211(a), on attorneys' fees).

to reverse the retroactive effect of a Supreme Court decision. Because legislation "looks to the future,"[30] Section 27A(b), a statute that affects only closed cases, lacks the fundamental and defining characteristic of legislation.[31]

D. The Separation of Powers Doctrine Does Not Permit the Overturning of a Final Judgment Because It Is Based on Limitations Grounds Or For Any "Equitable" Reason.

In its "due process" or "vested rights" discussion, the Fifth Circuit held that because limitations periods are a matter of "legislative grace," Section 27A(b) does not offend principles of due process because Congress acted "rationally" when it legislatively removed the *Lampf* limitations bar. 997 F.2d at 50; Pet. App. at A-22 (citing *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314-15 (1945)). This principle lacks merit in the due process context (*see* p. 35-40, *infra*), and cannot, in any event, mitigate or justify the intrusion on separation of powers that Section 27A(b) represents.

A judgment is a judgment and this Court has made it clear that interference with such decrees of an Article III court is *per se* impermissible — without inquiry or analysis of the reasons

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30. *See New Orleans Publ. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 370-71 (1989) (quoting *Prentis* v. *Atlantic Coast Line, Inc.*, 211 U.S. 210, 226 (1908)); *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678-79 (1881) (legislative declaration may, at the "utmost," alter "existing law in its application to future transactions").

31. In addition, retroactive legislation that "prescribe[s] a rule for the decision of a cause in a particular way" without changing the underlying law violates the Constitution. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). Although the circuit courts that have considered the issue have determined that Section 27A(a) does not violate the rule in *Klein*, they have reaffirmed the protections to which final judgments are entitled under other constitutional doctrines. *See, e.g., Johnston*, 1993 WL 500842, at *2, *5.

behind the judgment. If the Congress may undo a judicial order because it is based on one particular affirmative defense, there is no logical reason why the legislature could not widen its sights to embrace other defenses, or even equitable considerations. If Congress were able to undo judicial action, under the guise of a "balancing test" — particularly one which would emphasize equitable considerations — the possibilities of "remedial" legislation, stimulated by popular pressures, would be endless. But this Court has refused to consider such a corrosive evasion of fundamental principles: "Where a power has been committed to a particular Branch of the Government in the Constitution, the balance already has been struck by the Constitution itself." *Public Citizen*, 491 U.S. at 486 (Kennedy, J., concurring). Thus, because Section 27A(b) violates separation of powers principles, it must be invalidated regardless of any equitable considerations that might be offered to justify the encroachment. *See Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 (1982) (considerations relating to "private suit[s] for damages" insufficient to justify intrusion on another branch).

* * *

In upholding Section 27A(b) on the grounds that the courts may "share [the] authority . . . to say when a controversy is done," the Fifth Circuit has violated the fundamental principle that "the Constitution does not contemplate that there shall be more than *one* Supreme Court," *O'Grady*, 89 U.S. (22 Wall.) at 647-48 (emphasis added). The view that the power to issue final judgments may be shared "provides no limiting principle," and thus "threatens to supplant completely our system of adjudication in independent Art. III tribunals." *Northern Pipeline*, 458 U.S. at 73 (Opinion of Brennan, J.). The Fifth Circuit's holding "would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government." *Id.* at 74.

II. SECTION 27A(b) VIOLATES THE FIFTH AMENDMENT.

A. The Fifth Amendment Protects Property Rights Vested In Final Judgments.

By enacting Section 27(A)(b), Congress not only violated Article III, it infringed upon petitioners' vested property rights. The Fifth Amendment also prohibits (or requires just compensation for) legislation which divests a private litigant of a final judgment that is no longer subject to judicial modification.

This principle dates back to *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856), in which this Court accepted as a "general proposition . . . certainly not to be denied" that an "act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby."[32]

Purely private rights, once finally adjudicated, "become[] absolute" and are "beyond the reach of Congress." 59 U.S. (18 How.) at 431. When private rights have "passed into judgment," this Court held, "it is the duty of the Court to enforce it." *Id.*[33] In *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870), this Court observed that "if the remedy [in *Wheeling &*

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32. The Fifth Circuit acknowledged *Wheeling* but simply declined to follow it. 997 F.2d at 46 n.11. In any event, several years before *Wheeling*, this Court explained that "no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." *Massengill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849).

33. In *Wheeling & Belmont Bridge Co.*, the Court decided that a portion of a judgment based upon the *public* right to river navigation could be altered because Congress had the constitutional power to regulate river navigation. However, the Court upheld the portion of the decree regarding the costs adjudged by a court, holding that such private rights were "unaffected by the subsequent legislation." 59 U.S. (18 How.) at 430.

Belmont Bridge] had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress." Similarly, this Court opined in 1884 that "due process of law" excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees." *Hurtado* v. *California*, 110 U.S. 516, 536 (1884).

In view of these authorities, this Court's decision in *McCullough* v. *Virginia*, 172 U.S. 102, 123-24 (1898), which the Fifth Circuit sought to dismiss as an aberration without a past or a future, had a firm precedential basis. In *McCullough*, this Court held that legislation that overturned a taxpayer's final judgment granting him a tax refund from the Commonwealth of Virginia was unconstitutional because:

> It is not within the power of the legislature to take away rights which have once vested by a judgment. Legislation may act on a subsequent proceeding, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.[34]

The Fifth Circuit concluded (or strongly implied) that *McCullough* is no longer good law, in large part, because "the Court has never applied this holding in *McCullough* to decide

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34. The Fifth Circuit maintained that *McCullough* involved a case pending upon appeal, not a final judgment. 997 F.2d at 46; Pet. App. at A-15. However, in both *McCullough*, 172 U.S. at 123-24, and in *Hodges*, 261 U.S. at 603, this Court described *McCullough* as involving a "judgment." And McCullough's case was only "pending" in the sense that he had filed a writ of error to the Supreme Court of Appeals of Virginia. 172 U.S. at 123-24. Under Virginia law, such a petition for writ of error "does not affect the finality of the judgment." *Hirschkop* v. *Commonwealth*, 209 Va. 678, 166 S.E.2d 322, 323-24, *cert. denied*, 396 U.S. 845 (1969) (citing cases).

another case." 997 F.2d at 46; Pet. App. at A-15. To begin with, as the Sixth Circuit held in *Plaut*, "we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court or on us . . . . *McCullough* remains good law . . . even if the Supreme Court has not ruled on a similar case since." *Plaut*, 1 F.3d at 1493 n.12. The Second and Tenth Circuits reached the same conclusion. *Johnston*, 1993 WL 500842, at *5 ("the Court has reiterated the vested rights principle underlying *McCullough* on several occasions"); *Axel Johnson*, 6 F.3d at 83.

At any rate, the Fifth Circuit is simply incorrect in its assertion that *McCullough* is a maverick decision, which has been ignored by the courts. Instead, either expressly or implicitly, this Court has on numerous occasions approved the *McCullough* doctrine; in fact, the very next year in *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899), this Court reiterated that "it is undoubtedly true that legislatures cannot set aside the judgments of courts."

Similarly, in *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922), this Court invalidated state legislation that retroactively abolished a claim for tolls unlawfully collected in a case in which the Florida Supreme Court had already ruled in the plaintiff's favor. One year later, in *Hodges* v. *Snyder*, 261 U.S. at 603, this Court specifically reaffirmed *McCullough* and *Wheeling & Belmont Bridge*, stating that "the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Id.* This Court upheld the legislative decision to overturn a judgment of the Supreme Court, but only because the legislation merely affected the "public rights involved" and did not impair the private "judgment for costs." *Id.* at 604.

By contrast, in a later case, this Court rejected an attempt to reopen a final decree in a case where private rights were at stake. *See Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*,

284 U.S. 370, 389 (1932) (Commission could not repeal its own award of reparation retroactively; it could repeal the order as it affected future conduct and substitute a new rule of conduct).

In considering legislation analogous to Section 27A(b), in *Stewart* v. *Keyes*, 295 U.S. 403 (1935), this Court refused to permit a plaintiff to reopen the sale and deed of a property that had been ordered by an Oklahoma court in 1916. *Id.* at 416-17. As in this case, the plaintiff contended that supervening legislation had divested the defendants of the benefit of a limitations period. *Id.* at 416. The unanimous Court decided that the legislation could not reopen the "extinguished claim":

> [W]here the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. "The reason is," as this Court has said, "that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

Id. at 417 (quoting *Campbell* v. *Holt*, 115 U.S. 620, 623 (1885)).[35]

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35. The principle in *Stewart* applied in the context of a suit "to recover real or personal property." 295 U.S. at 417. Nonetheless, the reasoning of *Stewart* extends to all situations in which a repealing act attempts to deprive "vested" property that had "become the defendant's" prior to the enactment of the legislation. *Id. See also Campbell*, 115 U.S. at 623, 628 (change in limitations period may not overturn "vested" right and limitations bar may be changed "until the bar is complete").

In response to this uniform and unbroken precedent, the lower courts have repeatedly condemned legislative efforts to overturn final judgments and have adhered to the rule of *McCullough*. *See Central States Pension Fund*, 960 F.2d at 1345; *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810; *Daylo*, 501 F.2d at 816; *De Rodulfa*, 461 F.2d at 1252; *Adams*, 147 F.R.D. at 268; *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 612 F. Supp. 643, 646 (D.D.C. 1985); *Board of Educ. of the City of Chicago*, 588 F. Supp. at 235; *Electronic Data Sys. Corp.*, 508 F. Supp. at 1363; *see also American Federation of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989); *Tonya K.*, 847 F.2d at 1247-48 ("once a court has disposed of a case, Congress may not dictate a different result"); *Taxpayers for Animas-La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477 (10th Cir. 1984). Academic commentators are in agreement. *See* Palm, *The Constitutionality of Section 27A*, n. 12, *supra* at 1287 & n. 295-96; Note: *Section 27A of the SEA: An Unplugged* Lampf, n. 12, *supra* at 206-07 & n. 61-62.

B. Modern Due Process Jurisprudence Requires Reaffirmation of *McCullough* and the Vested Rights Principle.

Apart from the contention that *McCullough* is simply too old to be good law, the Fifth Circuit erroneously concluded that *McCullough* has been overruled *sub silentio* by the recent "jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation." 997 F.2d at 47; Pet. App at A-16. In so holding, the Fifth Circuit rejected what it characterized as the "hackneyed" rule that "a law cannot be retroactively applied to impair vested rights" (*id.* (citation omitted)) — indeed, the court just declined to "waste

. . . further time'' with the ''confusing'' terminology of ''vested rights.'' 997 F.2d at 47; Pet. App. at A-17.[36]

This Court's decisions evince a consistent reliance on the concept of vested rights and a continuing effort to delineate between inchoate unvested rights and the vested rights to which Fifth Amendment protections attach. The ''concept of vested rights'' is the ''test for evaluating retrospective laws in a civil context.'' *Weaver* v. *Graham*, 450 U.S. 24, 31 n.13 (1981) (dictum). For example, in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 720 (1974), this Court noted that it ''has refused to apply an intervening change . . . where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional.'' *Id.* at 720 (citations omitted).

Accordingly, ''once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property.'' *Johnston*, 1993 WL 500842 at *5 (citing *Axel Johnson*, 6 F.3d 83 (2d Cir. 1993)). *See Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810. There is no question that ''[a] judgment that has become final through exhaustion of all appellate remedies is a property right.'' *Central States Pension Fund*, 960 F.2d at 1345.[37] This

36. In so concluding, the Fifth Circuit relied on a broad generality from what it termed a ''seminal'' treatise, N. Singer, 2 Sutherland Statutory Construction § 41.05, at 364-365 (C. Sands 4th ed. 1986). Less than thirty pages later, in this ''seminal'' treatise, the following sentences appear:

> Where their retroactivity does not otherwise render them invalid, laws may retroactively affect litigation *where the judgment has not become final*. Since legislative enactments may have the effect of rendering court judgments ineffective, *it is the direct legislative reversal of a court decision that is per se objectionable*.

Id. at § 41.08, at 395 (5th ed. 1993) (emphasis supplied).

37. Moreover, as Pacific Mutual concedes, the final judgment of the district court provided Petitioners with the tangible right to relief from exposure to Section 10(b) claims under the Securities Exchange Act of 1934 (which as a matter of law cannot be heard in state court).

is the clear import of this Court's precedent insofar as final judgments,[38] and other intangible property rights,[39] are concerned. Even the Fifth Circuit acknowledged that a final judgment itself is ''a species of property right,'' 997 F.2d at 51 n.14; Pet. App. at A-25 n.14, but held erroneously that a vested right could be divested if the legislature has a ''rational basis'' for doing so.

Such a rational relationship standard is simply inapplicable. The Constitution ''prohibits (or requires compensation for) all retroactive laws that destroy vested rights.'' *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring) (citing *Hodel* v. *Irving*, 481 U.S. 704 (1987) and *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1 (1977)). In addition to the cases involving final judgments, this Court has rejected efforts to overturn retroactively vested rights in a panoply of factual situations not involving final judgments; in none of these decisions did this Court hint that such interfering actions would pass constitutional muster upon a showing of mere rationality. For example, in *Asiatic Petroleum Co.* v. *Insular Collector of Customs*, 297 U.S. 666, 671 (1939), this Court opined that a Philippines Independence Act ''cannot operate retroactively to deprive the petitioner of rights vested before its adoption.'' *See also United States* v. *Darusmont*, 449 U.S. 292, 299 (1981) (retroactive taxes are subject to stringent due process analysis if the tax involves gifts that were ''made and completely vested'' before the enactment of the taxing statute); *Coombes* v. *Getz*, 285 U.S. 434, 442 (1932) (vested

38. *Supra* at 29-33 (citing, *inter alia*, *McCullough*, 172 U.S. at 123; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 431).

39. This Court has ruled that intangible types of property are fully protected by the Fifth Amendment. *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011-12 (1984); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77-78 (1982); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); J. Nowak & R. Rotunda, Constitutional Law 4th at § 11.12 (1991).

contract right may not be destroyed retroactively because it acquires "independent existence competent to survive the destruction of the provision which gave it birth"); *Ettor* v. *City of Tacoma*, 228 U.S. 148, 156 (1913) (invalidating legislation that "deprive[d] the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right").[40]

These decisions establish that a legislature may not divest an individual of rights once they become "vested" — at least not without just compensation. Nonetheless, it is true that whether rights have vested is not necessarily self-evident; the Court must still determine "what circumstances qualify a right to be characterized as 'vested.' " 997 F.2d at 47; Pet. App. at A-17 (citations omitted). However, under any "circumstances," the rights and liabilities fixed in the final judgment of an Article III represent a vested property right because:

> [A] judgment is the "perfected" claim. The speculation surrounding the legal relation of the litigants has been dispelled and their respective obligations have been established. A court has considered the merits of each party's claim and has rendered a judgment in favor of one of them. It is, therefore, consistent with the aims of property law that a final judgment be accorded more comprehensive protection than the underlying claim. The value and efficacy of the judicial process would be seriously impaired if the legislative and executive branches did not recognize and support the sanctity of a final judgment.

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40. *See also National Wildlife Federation* v. *Marsh*, 747 F.2d 616, 620 (11th Cir. 1984) ("A new law will not be applied if it adversely affects a party's vested rights."); *In re Reynolds*, 726 F.2d 1420, 1424 (9th Cir. 1984) ("[I]n matters involving property rights, retroactive application of a new statute might result in an unconstitutional taking of property without due process of law.").

Cooke, Dames & Moore v. Reagan — *Rights In Conflict: The Fifth Amendment Held Hostage*, 31 Amer. U. L. Rev. 345 (1982).

Certainly, a final judgment is even more firmly "vested" than the unadjudicated entitlements, described above, that this Court has previously deemed vested: a tariff (*Asiatic Petroleum*, 297 U.S. at 671); a contract (*Coombes*, 285 U.S. at 442); a rate of gift taxation (*Darusmont*, 449 U.S. at 299); liens (*Security Indus. Bank*, 459 U.S. at 77-78; *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)); a bond covenant (*United States Trust Co.*, 431 U.S. at 31-32); a mortgage (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 580 (1935)); a right to a construction permit free of public easements, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987), and the right to dispose of Indian lands at death (*Hodel*, 481 U.S. at 715-17). All of these were unadjudicated entitlements; none had previously been vested in the claimants by the judgment of an Article III court.

The Fifth Circuit did not mention any of these precedents. Instead, it concluded that this Court had "retreated" from *McCullough* in issuing decisions such as *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and similar cases that permit legislation to operate retroactively even if "settled expectations" regarding economic issues are overturned, such as the expectation of coal mine operators that they would be free of liability for black lung disease. But the coal mine operators in *Usery* had no final judgment vesting their right to be free of such liability. *Usery* and similar cases do not state, or even imply, that such a vested right would have been ignored, or subject to divestiture upon a showing of rational basis. Nor do they overrule, or even alter, *McCullough*, *Stewart* or any of the cases that accord constitutional protection to final judgments or other rights that are not merely expectations, but "vested" rights.

At most, *Usery* and similar cases permit the legislature to "restrict" the way vested property rights "are used, or to condition their continued retention on performance of certain

affirmative duties," *United States* v. *Locke*, 471 U.S. 84, 104 (1985), subject to a showing of mere rationality. But these cases do not permit the retroactive *elimination* of vested property rights, much less the vacation of final judgments, based on nothing more than a finding of "rational basis."

Usery does not alter the axiom that "[a]lthough the state possesses the power to regulate property without payment of compensation, if the regulation goes too far, a taking may be found." J. Nowak & R. Rotunda, Constitutional Law 427 (4th ed. 1991); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). If legislation results in the "total destruction by the Government of all value," such an effect is not a "mere 'consequential incidence' of a valid regulatory measure." *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960) (legislation making it impossible for petitioners to enforce their materialmen's liens which had attached under state law effected a taking).[41] Thus, before the passage of Section 27A(b), defendants "admittedly had compensable property" — freedom from the possibility of a federal claim for millions of dollars. "Immediately afterwards, they had none." *Armstrong*, 364 U.S. at 48. Such a deprivation cannot be justified merely by showing that the Government nullification of a vested right might have a "rational" basis.[42]

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41 *See First Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316-17 (1987); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77-78 (1982); *Louisville Joint Stock Land Bank*, 295 U.S. at 580 (legislation depriving mortgagees of substantial incidents of their rights against mortgaged property effected a taking).

42 The decisions cited by the Fifth Circuit that apply a rational basis standard are fully consistent with this principle; none involves the complete elimination of a vested property right. *See, e.g., United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989) (permitting payment of monetary award to be contingent on payment by recipient of award of user fee to tribunal, but not suggesting that award could be entirely divested); *Pension Benefit Guar. Corp.* v. *R.A. Gray Co.*, 467 U.S. 717, 733-734 (1984) (act conditioned an employer's right to withdraw from a pension plan on a requirement that the employer compensate the plan for benefits that have already vested with

Thus, no court, other than the Fifth Circuit in this case, has ever extended the principle in *Usery* to upset the principle in *Mahon* and *Armstrong* and to authorize Congress to eliminate rights vested in a final judgment. Based on *Usery* and similar cases, the courts have retroactively applied statutory changes in *pending* cases, but have consistently recognized that retroactive legislation cannot undermine "definite or enforceable property rights . . . reduced to final judgment." *See, e.g., Georgia Ass'n. of Retarded Citizens*, 855 F.2d at 811 (citing *Usery* but holding that Congress' power to create "new legal rights . . . does not permit it to disturb a right that vests as the result of a judgment"); *Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *In re TMI Litig. Cases Consolidated II*, 940 F.2d 832, 861 (3d Cir. 1991) (citing *Usery* and *Arbour* v. *Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) and stating that a claim affords no property right "until reduced to final judgment"), *cert. denied*, 112 S. Ct. 1262 (1992); *Lunsford* v. *Price*, 885 F.2d 236, 240 n.13 (5th Cir. 1989); *Grimesy* v. *Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (rights do not vest until "a final unreviewable judgment"), *cert. denied*, 111 S. Ct. 1620 (1991); *Canisius College* v. *United States*, 799 F.2d 18, 25-26 (2d Cir. 1986) (citing *Usery* and *Forbes Pioneer Boat Line*, but stating that right not protected because plaintiff "has no final judgment establishing such a right"), *cert. denied*, 481 U.S. 1014 (1987); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (Congress can act so long as claims have "not ripened into final judgment"), *cert. denied*, 335 U.S. 887 (1948); *National Railroad Passenger Corp.* v. *State of Nev. Dept. of Conservation and Natural Resources*, 776 F. Supp. 528, 532 (D. Nev. 1991);

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employees at the time of the withdrawal); *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 516 (1938) (legislation did not eliminate rights of purchaser at foreclosure sale; it "merely delayed" the exercise of these property rights).

Michael Reese Hosp. & Medical Center v. *United States*, 684 F. Supp. 986, 991 (N.D. Ill. 1988).

C. The Cases that Have Purportedly Overturned Final Judgments Are Inapposite.

In its briefs below, the Government cited several other decisions of this Court which, it claimed, establish that the final judgment involved here was not entitled to protection, constitutional or otherwise. Not a single one mentions, much less overrules, *McCullough*, *Stewart* and their progeny. Moreover, none of these cases involves a legislative attempt to reopen a final judgment of an Article III court in a closed case brought by a private litigant in which money damages were at stake.

Instead, each decision falls into one of several narrow exceptions to the otherwise absolute rule applying the protections of the Fifth Amendment to final judgments — none of which applies to this case and none of which undermines the general rule of absolute protection for final judgments. First, final judgments of injunctive relief that affect public rights are vulnerable to legislative reopening. *See, e.g., Fleming* v. *Rhodes*, 331 U.S. 100, 106-07 (1947); *Hodges*, 261 U.S. at 603; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 429; *see* p. 42, *infra*. Second, administrative decisions of Article I courts may be legislatively altered. *See Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-79 (1940); *Stephens*, 174 U.S. at 477. *See* p. 43-44, *infra*. Third, decisions rendered in times of war or national emergency are more vulnerable to legislative reopening. *See Fleming*, 331 U.S. at 106-07; *Freeland* v. *Williams*, 131 U.S. 405, 417-21 (1889). Fourth, Congress may waive the *res judicata* defense when a prior judgment was entered in the Government's favor on a claim against the Government. *See Sioux Nation*, 448 U.S. at 371. *See* p. 24, *supra*. Finally, void judgments and those obtained by fraud confer no vested rights. *See, e.g., Freeland*, 131 U.S. at 418-19; *Sampreyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 237- 39 (1833) (judgment obtained

by fraud in favor of a fictitious person). *See* p. 44, *infra*.[43]

These precedents represent "no broad departure from the constitutional command" that the Fifth Amendment prohibits, or requires compensation for, the taking of a final judgment. *Cf. Northern Pipeline*, 458 U.S. at 63 (Opinion of Brennan, J.) (discussing separation of powers). Accordingly, no court, other than the Fifth Circuit in this case, has ever applied these cases to overturn a final judgment of an Article III court in favor of a private litigant in a case involving money damages.[44]

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43. In its briefs in *Plaut*, the Government asserted that "curative legislation" could also fall outside of the broad prohibition against the legislative nullification of final judgments. However, even if that assertion is correct, it would not excuse the deprivation caused by Section 27A(b). Curative legislation corrects "defects in the administration of the law," such as a mistake in processing taxpayer refund claims or other "mistake[s] of officers purporting to administer the law in the name of the Government." *See Graham & Foster* v. *Goodcell*, 282 U.S. 409, 427, 429 (1931); *Van Emmerick* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J. dissenting from denial of certiorari) (curative legislation may remedy only "administrative, procedural, and technical defects unrelated to the underlying policy"). Section 27A(b) did not "cure" administrative mistakes, but purported to nullify the decision of this Court in *Lampf* and the final judgment of an Article III court in this case. A curative statute may not be applied in this manner, which "demolish[es] intervening vested rights." *American Fed. of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989) (citing *Forbes*, 258 U.S. at 338). *See also Hodges*, 261 U.S. at 603; *United States* v. *Heinszen*, 206 U.S. 370, 384 (1907) (curative legislation cannot interfere with "intervening rights").

44. The lower courts have recognized a number of limited exceptions to the inviolability of final judgments, but have also stated that those exceptions do not undermine the absolute protection accorded final judgments between private parties in a case involving money damages. *See Johnston*, 1993 WL 500842, at *8 n.10 (describing limited exceptions for judgments in favor of the government and those involving public rights); *Georgia Ass'n*, 855 F.2d at 811 (same); *Daylo*, 501 F.2d at 816 (final judgments may be upset only in "exceptional circumstances," including public rights); *De Rodulfa*, 461 F.2d at 1252 n.61 (public rights exception).

The Fifth Circuit heavily relied on *Fleming* v. *Rhodes*, 331 U.S. 100 (1947), where this Court sustained legislation that prevented landlords from enforcing state court judgments of eviction obtained against tenants. *Fleming* involved neither an action for money damages nor the judgment of an Article III court. More fundamentally, this Court has already determined that *Fleming* did not affect the rights vested in a final judgment but only permitted "Federal regulation of future action." *Federal Housing Admin.* v. *Darlington Mills*, 358 U.S. 84, 90 (1958); *id.* at 93 (Frankfurter, J., dissenting) (*Fleming* did not involve "the complete wiping out of . . . 'vested rights' "). *See also Johnston*, 1993 WL 500842, at *6 ("*Fleming* did not compel the courts to reopen final judgments; rather the legislation merely directed courts to enjoin future proceedings by the appellant"); *Battaglia*, 169 F.2d at 259 (*Fleming* applies to claims that "had not ripened into final judgment"); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 n.6 (E.D. Mich. 1992); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 719 n.146 (1960) (the statute in *Fleming* was "construed as preventing only future evictions . . . [not as] depriving a person of a previously acquired judgment.").[45]

Fleming is distinguishable on several other grounds. The case involved the constitutionality of the Emergency Price Control Act, a wartime emergency measure, a context in which retroactive legislation is far more likely to withstand constitutional scrutiny.[46] Moreover, *Fleming* involved the assertion of

45. This interpretation of *Fleming* is confirmed by the *Fleming* Court's reliance (331 U.S. at 107 n.12) upon *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-79 (1940), a case in which the Court specifically reaffirmed the decisions in *Forbes Pioneer Boat Line*, 258 U.S. at 338, and *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 431. *See Paramino Lumber*, 309 U.S. at 378 n.13, 379 n.15. *See* p. 43-44, infra.

46. The *Fleming* Court also relied upon *Bowles* v. *Willingham*, 321 U.S. 503 (1944), for the proposition that the act was of "unquestioned" constitutionality. *Fleming*, 331 U.S. at 106. But *Bowles* turned in part upon the fact

public rights by, and the grant of injunctive relief in favor of, the federal Price Control Administrator. Unlike the private rights vested in favor of defendants here, public rights may be "annulled by subsequent legislation." *Hodges* v. *Snyder*, 261 U.S. at 603; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 431-32. Also, judicial decrees in equity, unlike other final judgments, are more "vulnerable" to legislative modification because of the prospective and thus "legislative" nature of injunctive relief. *Daylo*, 501 F.2d at 818.[47] *See also System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961) (modification of injunction permissible because "injunction directed to events to come is subject always to adaptation as events may shape the need"); *Johnston*, 1993 WL 500842, at *6; *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 812; *accord Northern Pipeline*, 458 U.S. at 69-70 (disputes involving "public rights," as opposed to those involving private rights, may be removed from Article III courts).

Although the government relied on *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), below, that decision permitted the reopening of a compensation order from a non-Article III worker's compensation board only after noting that the "private act" in question "does not set aside a judgment,

that the act provided "all that due process *under the war emergency* requires." 321 U.S. at 521 (emphasis added). "[I]t is undeniable that emergency legislation is more likely to receive favorable treatment by the Court than are other retroactive statutes." Hochman, *Retroactive Legislation*, 73 Harv. L. Rev. at 700. *See also United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

47. "Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief." *Plaut*, 1 F.3d at 1495.

create a new right of action or direct the entry of an award." 309 U.S. at 378.[48] Similarly inapposite is *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 477-78 (1899), in which the Court reopened a judgment of a territorial "legislative" court, *i.e.*, an Article I court, based on Congress' plenary power over Indian affairs. *See United States* v. *City of McAlester*, 604 F.2d 42, 47 (10th Cir. 1979). *Stephens* reaffirms the proposition that "it is undoubtedly true that legislatures cannot set aside the judgments of courts" and the Court specifically refused to "interfere in any way with the judicial department of the Government." 174 U.S. at 478.

Also inapposite is *Freeland* v. *Williams*, 131 U.S. 405 (1889), a decision cited in almost no subsequent opinions, which turned in large part on the purpose of "quieting strife and securing repose after the turmoils of a civil war."[49] And the decision overturned a void judgment "rendered on account of acts done in pursuance of the powers of a belligerent in time of war." *Id.* at 417. Moreover, *Freeland* "predated *McCullough* and, therefore, to the extent, if any, that *Freeland* conflicts with *McCullough's* pronouncements, *McCullough* controls." *Johnston*, 1993 WL 500842, at *6 n.7.[50]

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48. The *Paramino Lumber* court also reaffirmed the decisions in *Forbes Power Boat Line* and *Wheeling & Belmont Bridge*. *See* 309 U.S. at 378-79. It also suggested that, apart from due process, a legislative effort to overturn final judgments might contravene separation of powers principles. *See* 309 U.S. at 381 & n.25 (legislation "affecting judicial judgments rather than administrative orders" could be an "excursion of the Congress into the judicial function") (citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)).

49. *Id.* at 419. Retroactive legislation in an emergency context is "far more likely" to withstand constitutional scrutiny. *See supra* at n. 46.

50. This Court has also cited *Freeland* at the same time that it has adhered to the rule that "legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U.S. at 478.

D. Judgments Based on Limitations Grounds Are Entitled to Due Process Protection.

The Fifth Circuit's principal response to the foregoing contentions was that Congress acted "rationally" when it deprived defendants of a final judgment because that decree was based upon a statute of limitations defense. In so holding, the Fifth Circuit cited excerpts from *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), which the court interpreted as suggesting that the "shelter" of the statute of limitations was not a "fundamental" right. 997 F.2d at 49-50; Pet. App. at A-22.

In *Chase*, this Court permitted the plaintiff to take advantage of a retroactive change in a limitations period when the case was still *pending* — the situation in *The Schooner Peggy*, but not in the case at bar. Indeed, in two separate portions of the *Chase* opinion, this Court made it abundantly clear that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor," 325 U.S. at 310, *id.* at 316, and that plaintiff had no constitutional right "before final adjudication."[51] It is hard to imagine two plainer signals that a different result in *Chase* would have been reached if the defendant had obtained a final judgment before the statute had been enacted.

Recognizing this obvious inference from *Chase*, the Fifth Circuit advanced a remarkable theory: as *Chase* "predates

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51. *See also Johnston*, 1993 WL 500842 at *6 (*Chase* did not involve a final judgment); *Plaut*, 1 F.3d at 1496 ("Congress may change an established time bar. . . . But where the courts have *adjudged* a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment.") (discussing *Chase*). "Even though Defendants do not have vested rights in a particular statute of limitations, Defendants *do* have vested rights in this Court's judgment dismissing Plaintiff's Section 10(b) claims." *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) (emphasis in original).

both *Fleming* and *Usery*," which the Fifth Circuit characterized as holding that final judgments may be upset "under some circumstances," the "final adjudication" caveats in *Chase* no longer need be heeded. 997 F.2d at 50; Pet. App. at A-23. This contention, which borrows parts of holdings from three inapposite cases and cobbles them into a conclusion which would overrule, *sub silentio*, a century of precedents, does not merit serious consideration.

It bears mention that, since *Chase*, the courts have reaffirmed that statutes of limitations "are an integral part of the legal system and are relied upon to protect the liabilities of persons and corporations active in the commercial sphere." *Bendix Autolite Corp.* v. *Midwesco Enterprises*, 486 U.S. 888, 893 (1988). "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents of the Univ. of the State of N.Y.* v. *Tomanio*, 446 U.S. 478, 487 (1980). *See also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (limitations periods convey "the right to be free of stale claims"); *Shoup* v. *Bell & Howell Co.*, 872 F.2d 1178, 1181 (4th Cir. 1989) ("statutes of limitations . . . are no less important than other rules of decision"); *PRC Harris, Inc.* v. *Boeing Co.*, 700 F.2d 894, 896 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). Principles of finality are "not a mere matter of practice or procedure" and are instead "a rule of fundamental and substantial justice." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). And, "[a] decision by a federal court adjudging a claim to be time barred is a final judgment on the merits, and, once a claim is so adjudged, Congress cannot direct the court to reopen the judgment. . . ." *Johnston*, 1993 WL 500842, at *7; *see also* Fed. R. Civ. P. 41(b) (limitations dismissal is adjudication on the merits).

However one characterizes statute of limitations protections, the fact remains that petitioners have been deprived of a judgment — not just an unmatured or inchoate right to relief.

And it is settled that the right to be free of liability is entitled to the same constitutional protection as the right to awards of monetary damages or tangible property, including judgments of dismissal and other forms of non-monetary relief.[52] "Like an award of damages or an award of costs, the right to receive — and conversely, the *right not to pay* — attorney's fees is, in the parlance of these cases, a private right not subject to divestiture by retroactive legislation." *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 812 (emphasis supplied). This result is supported by the principle that "[a] final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 282 (1980) (opinion of Stevens, J.); *see also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (due process clause protects "civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property").

Additionally, the Government and Pacific Mutual's contention that the final judgment in this case was an "unfair windfall" (*see, e.g., Johnston*, 1993 WL 500842, at *4) is unavailing and inaccurate. Far from constituting a "windfall", *i.e.*, an unintended consequence of an act effected for other purposes, the result in the District Court was specifically intended

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52 *See Benoni*, 828 F.2d at 54, 57 (discussing constitutional restrictions on private bill intended to resurrect dismissed claims); *see also American Fed. of Government Employees*, 870 F.2d at 726 n.20 (controversy involving executive order on unionization was not moot because subsequent order could not eliminate vested rights in prior order; no discussion of monetary damages); *Board of Educ.*, 588 F. Supp. at 235 (discussing constitutional limitations on subsequent legislation undermining desegregation consent decree, with no discussion of monetary damages); *Cerro Metal Prods.*, 467 F. Supp. at 877 (refusing to give retrospective effect to Secretary of Labor's revision of regulation on search warrants based on separation of powers concerns; no monetary damages involved).

by the Court and mandated by its decisions in *Lampf* and *Beam*. Moreover, the "ad hoc determination[s] of the equities in a particular case" must yield to the principle of finality. *Federated Department Stores*, 452 U.S. at 401 (quoting *Heiser* v. *Woodruff*, 327, U.S. 726, 733 (1946)). *See Beam*, 111 S. Ct. at 2447 (Opinion of Souter, J.); *see also Harper*, 113 S. Ct. at 2517 (case law changes applied retroactively to "cases still open on direct review"). "Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power." *Johnston*, 1993 WL 500842, at *7 (quoting *Plaut*, 1 F.3d at 1498-99).

E. Rule 60(b)(6) Does Not Undermine the Inviolability of the Final Judgment.

The Fifth Circuit's reliance on Fed. R. Civ. P. 60(b)(6) to justify a *legislative* attempt to reopen a final judgment (997 F. 2d at 49; Pet. App. at A-20) is also mistaken. Again, apart from the decision below, no court has ever decided that Rule 60(b) could provide a basis for undermining the constitutional protection accorded vested rights.[53] As the court in *Johnston* held:

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53 The Fifth Circuit also erred in holding that a change in law warrants R. 60(b)(6) relief. 977 F.2d at 49; Pet. App. at A-21. In fact, the courts have generally ruled that a court's mistake in the law and/or a mere change of law are not sufficient grounds for reopening a final judgment for money damages under R. 60(b)(6). *Ackermann* v. *United States*, 340 U.S. 193, 197-99 (1950) (denying R. 60(b)(6) relief, despite intervening decision in a related case, the record in which contained "all the evidence" pertinent to petitioner's case); *Van Skiver* v. *United States*, 952 F.2d 1241, 1245 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 89 (1992); *Ritter* v. *Smith*, 811 F.2d 1398, 1401 (11th Cir.) ("something more than a 'mere' change in the law is necessary to provide the grounds for R. 60(b)(6) relief."), *cert. denied*, 483 U.S. 1010 (1987); *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 757 (2d Cir.) ("change in decisional law is not grounds for relief"), *cert. denied*, 479 U.S. 885 (1986). Moreover, virtually all of the courts that have reopened final judgments following a change in law under R. 60 have done so to modify an injunction, not a judgment in a case seeking money damages.

> The power of the courts to reopen final judgments under Rule 60(b) is narrow and subscribed . . . under Rule 60(b), final judgments are subject to a case-by-case evaluation by a tenured judge who is free from political pressure. The Rule 60(b) guidelines are far different from the rational basis review the government would advance for legislative action to deprive a private litigant of his or her final judgment.[54]

No decision of this Court remotely supports the view that the standards in Rule 60(b) allow the wholesale obliteration of vested substantive property rights by a legislative body, subject as it is to the constant blandishments and temptations of its various constituents. In the context of separation of powers principles, as well as vested rights, such a license would mean that there are no final judgments and thus "there are no 'rights' of any kind and every decision . . . is forever malleable." *Tonya K*, 847 F.2d at 1248.

Richardson v. *Bowen*, 807 F.2d 444, 446 n.3 (5th Cir. 1987) (analyzing numerous cases). *See also Marshall* v. *Board of Ed.*, 575 F.2d 417, 425 (3d Cir. 1978).

54 *See* Note: *Section 27A of the SEA: An Unplugged* Lampf *Sheds No Constitutional Light*, 78 Minn. L. Rev. 197, 226 (1993) (Rule 60(b) "is designed to provide litigants with an opportunity to revisit a judgment when a *court independently* determines in its equitable judgment that the facts of any particular case, including statutory changes, warrant reinstatement. Mandatory reinstatement through laws which reflect a legislative determination that an injustice occurred within the judiciary undermines the structural considerations implicit in Rule 60(b) by granting the legislature an impermissible power of ultimate judicial review.") (emphasis in original).

CONCLUSION

For all the foregoing reasons, petitioners respectfully submit that the judgment of the Fifth Circuit should be reversed.

Dated: New York, New York
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Respectfully submitted,

William R. Norfolk
Theodore Edelman
Timothy J. Helwick
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Fletcher L. Yarbrough
CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201
(214) 855-3000
Attorneys for Petitioner
Goldman, Sachs & Co.

Robert G. Cohen
Kathyrn A. Oberly
ERNST & YOUNG
380 Madison Avenue
New York, New York 10153
(212) 773-3800

Morton L. Susman
WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5000
Attorneys for Petitioner
Ernst & Young

*Counsel of Record

JAMES W.B. BENKARD*
James D. Liss
Vincent T. Chang
David Rosenfeld
Arthur J. Burke
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HANNAH BERKOWITZ
New York, New York 10019

James L. Truitt
HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202
(214) 761-2800
Attorneys for Petitioner
Morgan Stanley & Co. Incorporated

Robert B. Mazur
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149
(212) 371-9200

Ernest E. Figari, Jr.
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000
Attorneys for Petitioner
Salomon Brothers Inc

APPENDIX A

U.S. Const., Art. III reads, in pertinent part, as follows:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times receive for their Services a Compensation which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Fifth Amendment to the U.S. Constitution reads in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 93-609

In the Supreme Court of the United States

OCTOBER TERM, 1993

MORGAN STANLEY & CO., INCORPORATED, ET AL.,
PETITIONERS

v.

PACIFIC MUTUAL LIFE INSURANCE CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78aa-1(b) (Supp. IV 1992) which provides for the reinstatement, on motion by the plaintiff, of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is reported at 997 F.2d 39. The opinion of the district court, Pet. App. B1-B15, is reported at 806 F. Supp. 108.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. The petition for a writ of certiorari was filed on October 18, 1993, and was granted on January 10, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution and the Fifth Amendment to the Constitution are reproduced in pertinent part in the appendix to petitioner's brief. Pet. Br. App. A. Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), is reproduced in the appendix to this brief. App., *infra*, 1a.

STATEMENT

1. In March 1991, respondent Pacific Mutual Life Insurance Company (Pacific Mutual) filed a securities fraud action against petitioners in the United States District Court for the Northern District of Texas. The complaint alleged claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1988) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent common law fraud claims. Pacific Mutual's claims arose out of securities transactions that occurred in July and September 1987, approximately three and one-half years before it filed suit. Pet. App. A3, B2.

At the time Pacific Mutual brought suit, the Exchange Act did not contain a statute of limitations expressly applicable to its claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Section 10(b) actions were subject to limitations periods borrowed from state law. See, *e.g.*, *In re Sioux, Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). The applicable Texas statute of limitations subjected Pacific

Mutual's claims to a four-year limitations period. Accordingly, petitioners did not contest the timeliness of the action. Pet. App. A3.

On June 20, 1991, while the instant action was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* rejected the practice adopted by most circuits of borrowing state limitations periods and held that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under Section 9(e), a suit must be commenced no more than one year after the fraud is discovered and no more than three years after it occurs. 111 S. Ct. at 2782. Having adopted that new limitations period for Section 10(b) actions, the Court applied the rule to the parties in *Lampf* itself. See *id.* at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

On the same day that *Lampf* was decided, this Court also issued its decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). Under *Beam*, if the Court in a civil case applies a new interpretation of the law in the decision that announces it, courts must apply that interpretation of law to all other pending cases, even if the change in interpretation was not foreseeable and the parties had reasonably relied on prior judicial interpretations. The effect of *Beam* was to make applicable to all pending Section 10(b) actions *Lampf*'s view of the governing limitations period, whether or not the plaintiffs in those cases had relied on settled precedents establishing longer limitations periods.

Shortly after the decisions in *Lampf* and *Beam* were issued, petitioners moved for dismissal of Pa-

cific Mutual's complaint on the ground that the federal securities claims were now untimely. On August 16, 1991, the district court dismissed the federal claims with prejudice under *Lampf*, and dismissed the common law fraud claims without prejudice. J.A. 1-2. Because the federal claims were plainly untimely under *Lampf*, Pacific Mutual did not appeal the dismissal of those claims.[1] Pet. App. A4.

2. In December 1991, four months after the dismissal of this action, Congress added Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A represents an effort by Congress to protect victims of federal securities fraud who filed suit within the limitations periods set by pre-*Lampf* precedents, but whose suits were retroactively rendered untimely by the Court's decisions in *Lampf* and *Beam*.

Section 27A applies to private Section 10(b) actions that were commenced before June 20, 1991, the date that *Lampf* and *Beam* were decided. With respect to such actions, Section 27A provides that the limitations period "shall be the * * * period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991," the day before *Lampf* was decided. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). In jurisdictions (such as the Fifth Circuit) that applied a longer limitations period before *Lampf*, Section 27A has the effect of changing the governing law by substituting the longer limitations period for the "1-and-3" period that was borrowed in *Lampf* from Section 9(e).

[1] Pacific Mutual did, however, refile the common law fraud claims in state court. J.A. 15 n.4.

When Section 27A became law, many of the actions that were rendered untimely under *Lampf* were still pending in the federal system, either in the district courts or on appeal. Those cases are addressed by Section 27A(a), which is not at issue in this case.[2] Some suits, however, had been dismissed on the basis of *Lampf* and had not been appealed within the 30-day time limit imposed by Congress on private civil appeals. See 28 U.S.C. 2107(a) (Supp. IV 1992). To account for such cases, Congress enacted Section 27A(b), the provision at issue here.[3]

[2] The courts of appeals have uniformly sustained the constitutionality of Section 27A(a), which applies to cases pending at the time of its enactment. See *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993).

[3] Petitioners' amici suggest (Spendthrift Farm, Inc., et al., Amici Br. 25-28) that Section 27A(b) was not intended to apply to cases, like this one, that had been dismissed and were not pending on appeal. That suggestion, which petitioners have not joined, cannot be squared with the language of Section 27A(b). Section 27A(b) applies to "[*a*]*ny* [*pre-Lampf*] private civil action implied under section [10(b)] * * * which was dismissed as time barred" following *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992) (emphasis added). It contains no language limiting its reach to actions that had been dismissed but were pending on appeal. If Congress had wished to confine the scope of Section 27A in the fashion suggested by the amici, it could have dispensed with subsection (b) altogether,

Section 27A(b) provides a mechanism for the reinstatement of actions that had been "dismissed as time barred" following this Court's decision in *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). During a 60-day period beginning on December 19, 1991, the date of Section 27A's enactment, plaintiffs whose suits had been the subject of such dismissals could file motions seeking reinstatement. A district court presented with a reinstatement motion under Section 27A(b) must consider the timeliness of the suit by applying "the limitation period provided by the laws applicable in the jurisdiction" before *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). If the court determines that the suit is timely under that limitations period, the suit is reinstated; if the court determines that the suit remains untimely, the motion for reinstatement is denied.

3. In January 1992, within the 60-day period prescribed by Section 27A(b), Pacific Mutual moved to reinstate its federal securities claims. Pet. App. A5. In July 1992, the district court denied the reinstatement motion on the ground that Section 27A(b) is unconstitutional. *Id.* at B1. The district court held that Section 27A(b) violates the separation of powers doctrine by reopening final judgments of federal courts. *Id.* at B5-B15.

Pacific Mutual appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[4] and the United States intervened

since there would have been no need to provide a separate reinstatement mechanism for plaintiffs whose cases were pending on appeal.

[4] *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir. July 20, 1993), petitions for cert. pending *sub nom. BDO Seidman* v. *Simmons*, No. 93-313 (filed Aug. 26, 1993), and *Continental Insurance Co.* v. *Simmons*, No. 93-611 (filed Oct. 18, 1993).

in both appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Section 27A(b).[5] Pet. App. A8. The Securities and Exchange Commission, as amicus curiae, also supported the constitutionality of Section 27A(b).

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A33. The court held that neither the separation of powers doctrine nor the Due Process Clause of the Fifth Amendment prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A13-A28.

SUMMARY OF ARGUMENT

I. Section 27A(b) of the Securities Exchange Act of 1934 does not violate the separation of powers doctrine. While it has long been established that the decisions of Article III courts are not subject to review and reversal by another branch and that Article III courts may not be assigned the nonjudicial function of making advisory recommendations to other branches, Section 27A(b) infringes neither of those constitutional concerns. Section 27A(b) does not place the Legislative or Executive Branch in the role of reviewing the merits of the decisions of federal courts, and it does not reverse the holdings of federal

[5] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

courts. Nor does Section 27A(b) convert judicial decisions into nonbinding recommendations.

In Section 27A(b), Congress legislated a new statute of limitations for the class of securities fraud cases that had been dismissed in light of this Court's adoption of a new (and in many cases shorter) federal limitations period for implied Section 10(b) claims. Congress also provided a procedural vehicle for reinstating dismissed cases in order for the new law to be applied by the courts. Congress's actions were an exercise of legislative, not judicial, power. The provision is no different in effect than the creation of a new federal cause of action with a longer statute of limitations, an approach that raises no Article III concerns. And, under Section 27A(b), courts have only judicial functions to perform: the application of law to fact in particular cases and the rendering of final judgments on the merits. Accordingly, Section 27A(b) respects the division between legislative and judicial functions that the Constitution requires.

II. Section 27A(b) does not violate the Due Process Clause. Under this Court's jurisprudence, economic legislation that impinges on property interests is constitutional if it is reasonably related to a legitimate government interest. The notion that "vested rights" in a judicial judgment are immune to government regulation finds no support in modern cases, which recognize that Congress may affect property interests through retroactive, as well as prospective, legislation. The Court has specifically rejected the claim that rights represented by a judgment, alone of all property rights, are not subject to reasonable regulation. Here, Section 27A(b) is justified because it is a reasonable measure to protect the in-

terests of victims of securities fraud whose cases retroactively became untimely.

Even if Section 27A(b) were analyzed under older decisions describing a "vested rights" doctrine, however, the provision is constitutional. This Court's vested rights cases have always acknowledged that a legislature may provide for further judicial review of a judgment, even after the time for appeal has run. And those cases further hold that it does not violate due process for the legislature to provide new substantive rules of decision for application in the new review proceedings. Those cases establish that the concept of "vested rights" does not invalidate provisions, like Section 27A(b), that provide that for further review of a claim, notwithstanding a prior judgment, in light of new substantive law.

ARGUMENT

SECTION 27A(b) OF THE SECURITIES EXCHANGE ACT OF 1934 IS CONSTITUTIONAL

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Section 27A provides a mechanism for reinstatement of a limited class of securities fraud cases based on an application of a change in the governing statute of limitations; it does not adjudicate the timeliness of those actions under the revised law, and it does not dictate the ultimate judgments to be rendered. Nevertheless, relying on principles announced in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), petitioners contend (Pet. Br. 11-29) that Section 27A(b) crosses the constitutional line that separates the legislative power under Article I from the judicial power under Article III. Section 27A(b), however, does not raise the Article III concerns consid-

ered in *Hayburn's Case*. Section 27A neither involves an attempted exercise of the judicial power by another Branch of the government, nor requires the federal courts to exercise the non-judicial function of rendering a decision subject to review in another Branch. Accordingly, Section 27A(b) fully respects the separation of powers under the Constitution.

A. The Principles of *Hayburn's Case* Identify The Requirements For An Independent Judiciary

The basic separation of powers principles invoked by petitioners trace their source to *Hayburn's Case*, which involved the administration of a pension statute for disabled Revolutionary War veterans. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. Under that statute, the circuit courts created by the Judiciary Act of 1789 were directed to examine pension applicants to determine the nature and degree of their disability, and to "transmit the result of their inquiry" to the Secretary of War, if "in their opinion, the applicant should be put on the pension list." § 2, 1 Stat. 244. The Secretary of War, in turn, was authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress," in any case in which he had "cause to suspect imposition or mistake." § 4, 1 Stat. 244. The statute thus subjected a circuit court's ruling that an applicant should be put on the pension list to revision and reversal by the Secretary of War.

Hayburn's Case itself became moot before this Court had occasion to address the constitutionality of the pension statute. See 2 U.S. (2 Dall.) at 408; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (repealing challenged provision). Five of the six Justices of this Court, however, expressed their views on the statute

in their capacity as circuit judges.[6] Those views, which are collected in the report of *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-414, "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988).

All of the Justices who considered the statute stated that the Constitution did not authorize review and revision of the judgments of federal courts by the Executive or Legislative Branch. Chief Justice Jay and Justice Cushing stated that "by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. (2 Dall.) at 410. Justices Wilson and Blair likewise concluded that the "revision and controul" of judicial judgments by the Executive and Legislative Branches conflicted "with the independence of that judicial power which is vested in the courts." *Id.* at 411. And Justice Iredell concluded that "no decision of any court of the United States can, under any circumstances * * * agreeable with the Constitution, be liable to a revision, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested." *Id.* at 413.

The opinions in *Hayburn's Case* reflect two related Article III concerns. First, because Article III, Sec-

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[6] Circuit courts for the districts of New York, Pennsylvania, and North Carolina addressed the validity of the law, and each panel wrote letters to the President to express their views. See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 529-534.

tion 1 vests "the judicial Power" exclusively in the federal courts, neither Congress nor the Executive Branch may, in the words of Chief Justice Jay, act as a "court of errors," *Hayburn*, 2 U.S. (2 Dall.) at 410, by reviewing the judgments of Article III courts. Second, Article III precludes the federal courts themselves from carrying out "any duties, but such as are properly judicial * * *." *Ibid.* Because "the judicial Power" reposed in the courts by Article III contemplates the power to render final judgments that are conclusive of the parties' rights, see *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 457 (1899), a statute like the one in *Hayburn's Case*, which called on Article III courts to make nonbinding determinations, requires the courts to play a role that "is not judicial."[7] *Hayburn*, 2 U.S. (2 Dall.) at 410.

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[7] In *Hayburn's Case*, Chief Justice Jay and Justice Cushing construed the statute as an invitation to federal judges to "execute this act in the capacity of commissioners," 2 U.S. (2 Dall.) at 410, on the theory that individual members of the federal judiciary may carry out non-Article III responsibilities by accepting appointment to nonjudicial offices. The other Justices declined to exercise the jurisdiction conferred by the statute, *id.* at 411-414, and Chief Justice Jay and Justice Cushing later concluded that the statute did not authorize them to act as commissioners. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-50, 52-53 (1851) (discussing *Hayburn's Case* and the Court's subsequent consideration of the same statute in the unreported decision of *United States* v. *Yale Todd* (1794)). While inviting or requiring Article III judges to serve as commissioners might raise the question whether that assignment is consistent with Article III, cf. *Mistretta* v. *United States*, 488 U.S. 361, 402-404 (1989), that issue was not examined in *Hayburn's Case* and is not at issue here. Nor does this case implicate the Article III concerns raised when Congress assigns adjudicatory responsibilities to non-Article III tribunals in the first instance. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

B. Section 27A(b) Does Not Offend the Separation of Powers Principles of *Hayburn's Case*

When the concerns underlying *Hayburn's Case* are borne in mind, it becomes clear that Section 27A(b) does not violate the separation of powers doctrine. Section 27A neither places a non-Article III "court of errors" in review of decisions rendered by Article III courts, nor requires federal courts to carry out functions that are not "judicial" in character. Thus, the requirements of independent judicial decision-making voiced in *Hayburn's Case* are not threatened by Section 27A(b).

1. In enacting Section 27A, Congress did not exercise the "judicial Power" conferred on the Article III courts by "sit[ting] as a court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, to review the validity of judicial judgments under existing rules of decision. Instead, Congress acted in a quintessential exercise of its "legislative Power," Art. I, § 1, by passing a law that prescribes a new rule of decision to be applied by the courts. See *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407, 1413, 1414 (1992). Section 27A(b) changes the limitations periods for pre-*Lampf* Section 10(b) cases, provides a vehicle for application of that law to dismissed cases, and leaves the judicial function of applying the new limitations periods to the courts. Section 27A(b) is thus fundamentally different from the pension statute in *Hayburn's Case*. That law prescribed a single set of legal standards regarding eligibility for military pensions, but authorized the Secretary of War to overturn the

decisions of federal courts if the Secretary had cause "to suspect imposition or mistake" in the court's determinations. That form of executive review of judicial action constitutes impermissible oversight—an effective exercise of the "judicial Power"; Section 27A does not.

It would be one thing if Congress had reviewed the application of the *Lampf* statute of limitations in individual cases, and had directed the federal courts to reopen otherwise final judgments simply because it disagreed with the courts' determinations.[8] But it is quite another thing for Congress to provide a judicial remedy that requires the reopening of a judgment in order for the court to apply a newly legislated statute of limitations. Establishing a procedural avenue to have a new legal standard applied to a case is a legislative, not a "judicial," function. *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) (statute authorizing court to "reverse and annul any prior decree or adjudication" that is found to rest on forged evidence, whether or not the prior judgment was final and conclusive between the parties, "is in no respect the exercise of judicial powers").[9]

[8] Whether such a congressional determination would properly be characterized as an exercise of judicial, rather than legislative, power is not at issue here. Cf. *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 395, 398 (1798).

[9] *Sampeyreac* involved a prior judgment of a territorial court, not a court exercising Article III power. The Court's conclusion, however, that the statute at issue did not constitute an exercise of judicial power by Congress, but simply provided a new legal remedy, did not turn on the nature of the tribunal whose decision was retroactively made subject to further review. It turned, rather, on the nature of the statute at issue. 32 U.S. (7 Pet.) at 237-239.

Petitioners assert that Section 27A(b) "is not 'legislative' in any meaningful sense" (Pet. Br. 26) because it does not create a new limitations period for future Section 10(b) suits, but applies only retroactively. The "legislative Power" that Article I grants to Congress, however, encompasses the power to legislate retroactively. See, *e.g.*, *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2286-2287 (1993); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Nothing in Article I restricts Congress from giving legislation solely retroactive effect when the problem that Congress seeks to remedy is itself solely a retrospective one.[10]

Here, the most urgent problem faced by Congress was the retrospective impact of *Lampf* on plaintiffs who had relied on prior decisional law in filing securities actions that later were rendered untimely by *Lampf*. When Congress acted, some plaintiffs were

[10] Article I does contain one provision concerning purely retroactive legislation, the prohibition against ex post facto laws. Art. I, § 9, Cl. 3. But that prohibition, far from aiding petitioners' argument, actually undermines it. The adoption of the Ex Post Facto Clause implies that the power to legislate purely retroactively is within the scope of the "legislative Power" under Article I, since if retroactive legislation were not otherwise authorized by Article I, the ban would have been unnecessary. And the decision of the Framers to proscribe only a single class of retroactive legislation in Article I (namely, ex post facto laws) implies that the Framers did not intend for Article I to preclude the enactment of retroactive laws in other cases. Petitioners do not claim that Section 27A is itself an ex post facto law within the meaning of Article I, since the Ex Post Facto Clause applies only to criminal legislation. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531 n.4 (1954); *Calder* v. *Bull*, *supra*.

facing motions to dismiss based on *Lampf*; others had lost in district courts and had appealed; still others had received dismissal orders and had concluded that, in light of *Lampf*, an appeal would be frivolous. In all of those cases, *Lampf*'s retroactive application caused results that Congress perceived to be unfair. Legislation aimed at redressing that unfairness was necessarily retrospective. No decision of this Court suggests that, in these circumstances, retrospective legislation is anything other than an exercise of the "legislative Power" conferred on Congress by Article I.[11]

2. Nor does Section 27A(b) require federal courts to play a role that "is not judicial." *Hayburn's Case*, 2 U.S.C. (2 Dall.) at 410. The task assigned to district courts by Section 27A(b) is a fundamentally judicial one—that of applying a legal rule (the statute of limitations) to a controversy between the parties. It is for the courts, not Congress, to determine the effect of the legal rule in the circumstances of a particular case. Nothing in Section 27A(b) precludes courts from denying reinstatement in individual cases, if it determines either that "the law[] appli-

[11] Petitioners cite *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 370-371 (1989) (*NOPSI*), and *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908), for the proposition that legislation necessarily "looks to the future." Pet. Br. 27 & n.30. Neither *NOPSI* nor *Prentis* involved the scope of the legislative power under Article I. The quoted language addressed a wholly different issue, the characterization of state administrative proceedings for purposes of federal abstention doctrines. Petitioners also rely (Pet. Br. 27 n.30) on language in *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678-679 (1881), suggesting that legislation must operate only on future transactions. As we have noted, that suggestion does not accord with current law.

cable in the jurisdiction" before *Lampf* provides the same limitations period adopted in Lampf, or that the suit was untimely even under a different limitations period. And, if the court finds the suit timely, Section 27A(b) has no effect on the way a court will resolve the merits of the securities fraud claim itself. The ultimate judgment to be rendered remains within the control of the judiciary.[12]

Section 27A(b) does, of course, require courts to reinstate cases that have been dismissed, if they have first determined that the suits are timely under the new limitations period prescribed by Congress. But the provision of a reopening remedy does not infringe the courts' authority to render binding determinations in the sense required under *Hayburn's Case*. The prior determination of the district court in this case was that the statute of limitations, as announced by *Lampf*, barred this action. Congress has not "re-

[12] Petitioners thus err when they argue that Section 27A(b) represents a "greater intrusion on the role and right of the judiciary" than was present in *Hayburn's Case* because Section 27A(b) *"mandates* the automatic resuscitation" of cases, while the statute in *Hayburn's Case* "merely permitted" the Executive Branch to invalidate judicial decisions. Pet. Br. 16-17. Section 27A(b) does not "mandate" a change in a judgment, for if an action is untimely under the pre-*Lampf* statute of limitations, Section 27A(b) has no effect on the judgment at all. Whether the judgment is reopened depends on whether the new rule of decision (*i.e.*, pre-*Lampf* law with respect to the timeliness of the suit) requires that result on the facts of a particular case. It is difficult to understand how a statute that allows the Executive or Legislative Branch to revise decisions on a case-by-case basis (*Hayburn's Case*) is less offensive to separation of powers principles than a statute under which Congress does not select individual cases for review, and makes no effort to prescribe the outcome of any individual case.

viewed" or "reversed" that conclusion under the rule of *Lampf*, as might a "court of errors." Rather, Congress has simply required that an action be reinstated if the new statute of limitations is satisfied, and then to adjudicate the case on the merits.[13]

Section 27A is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations. Such a statute would raise no Article III concerns. It might be objected that the new right to sue overrides principles of res judicata. But res judicata is not of Article III dimension in this setting. Particularly where a prior judgment rested solely on the statute of limitations, without adjudication of the substantive claim, Congress is free to determine that the interest in having a claim heard on the merits overrides the equities and practical considerations that normally favor repose. And when the defense of res judicata is removed from the case, the courts cannot decline to hear a case by invoking Article III. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980).[14]

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[13] Accordingly, petitioners are incorrect in suggesting (Pet. Br. 23) that Section 27A(b) violates Article III's prohibition against advisory opinions. A judgment is not rendered "advisory" in the Article III sense when a court is obligated to revise it as a consequence of legislation enacted *pendente lite*, see *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and it is not rendered advisory when the parties' legal rights are altered by legislation enacted after the litigation, see *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (13 How.) 421, 431 (1855).

[14] This Court has described res judicata as a "common law doctrine[]," and has stated that "[c]ourts do not, of course,

In *Sioux Nation*, this Court rejected a separation of powers attack on a statute requiring the Court of Claims to entertain, "without regard to the defense of res judicata," an application by the Sioux Nation for further review of a takings claim that had previously gone to final judgment in favor of the United States. 448 U.S. at 391. The Court explained:

> When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills [takings] claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right.

Id. at 406-407.[15] That reasoning establishes that a statute creating "a new legal right" to sue for secu-

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have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria Federal Savings and Loan Assoc.* v. *Solimino*, 111 S. Ct. 2166, 2169 (1991). Res judicata (like the statute of limitations) must be raised as an affirmative defense in the federal courts. Fed. R. Civ. P. 8(c). It has never been thought that, when a defendant does not raise the defense of res judicata, Article III requires a federal court to conduct an independent inquiry into whether a federal court judgment was previously entered with respect to the same claim.

[15] *Sioux Nation* cannot be distinguished on the ground that Congress, in the exercise of its power to pay the Nation's debts, can waive the res judicata effect of a judgment that rejects a claim against the United States. Pet. Br. 24. The reasoning of *Sioux Nation* is equally applicable when Congress lifts the bar of res judicata in the exercise of some other

rities fraud, with an extended statute of limitations, would not infringe the Article III power of the courts to render final judgments. Yet such a statute would have the same consequences for the judicial system as does Section 27A(b). Congress's choice to employ the procedural route of requiring reinstatement of a case does not violate the separation of powers.

C. Section 27A(b) Does Not Conflict With The Historical Understanding Or Later Implementation of Article III

1. In addition to invoking the principles of *Hayburn's Case*, petitioners contend that Section 27A(b) is at odds with the historical underpinnings and original understanding of Article III. Pet. Br. 12-15; see Amici Br. 5-12. They note that legislatures during the period leading to the adoption of the Constitution often intervened in judicial proceedings, and they argue that Article III embodies a conscious goal

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constitutionally granted power. The source of Congress's power to override the defense of res judicata cannot be determinative of the question whether Article III is violated by a requirement that a court readjudicate a claim. For if res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by *any* party litigant. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850-851 (1986) (noting that Article III, § 1, "safeguards the role of the Judicial Branch in our tripartite system" by "preventing the encroachment or aggrandizement of one branch at the expense of the other"; holding that when that "structural principle [of Article III] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty," because "the limitations serve institutional interests [of the courts] that the parties cannot be expected to protect").

of precluding intervention by Congress in the affairs of the federal judiciary.

The historical record cited by petitioners surrounding the adoption of Article III gives little insight into how the Framers would have viewed a provision like Section 27A(b). Indeed, it stands for a good deal less than petitioners claim. For example, petitioners assert (Pet. Br. 14) that Charles Pinckney proposed congressional review of judicial decisions involving interstate disputes, and that the Constitutional Convention demonstrated its hostility to the idea of legislative review when it rejected Pinckney's proposal. But Pinckney's plan did not, in fact, call for Congress to review judicial decisions. Instead, the plan provided for interstate disputes to be resolved by specially appointed courts, whose judgments, far from being subject to congressional review, were explicitly made final and conclusive.[16] Con-

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[16] In his prepared remarks accompanying the introduction of his plan, Pinckney explained that he was proposing the same mechanism for resolving interstate disputes that was used in the Articles of Confederation. III M. Farrand, *Records of the Federal Convention* 117 (1966) (Pinckney). The Articles provided for States to resolve jurisdictional or territorial disputes by appointing "commissioners or judges to constitute a court for hearing and determining the matter in question." Articles of Confederation, Art. IX, ¶ 2; see P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 4 n.17 (3d ed. 1988). While the provision referred to Congress as the "last Resort on Appeal," it did not in fact provide for Congress to review the court's decision. Instead, Congress's role in this scheme was limited to: (1) notifying the second State that the first State was invoking the procedure; and (2) appointing the judges if the States were unwilling or unable to agree on the composition of the court. *Ibid.* Congress did

gress's rejection of Pinckney's proposal therefore says nothing about the Framers' views regarding the effect of legislation on judicial decisions.[17] To our knowledge, at no point did the Convention ever specifically address that issue.

While the Framers did, more generally, condemn legislative usurpation of judicial authority, the argument against such action was not always clearly cast in constitutional terms. For example, petitioners invoke (Pet. Br. 15) Alexander Hamilton's statement in *The Federalist* that "[a] legislature, without exceeding its province, cannot reverse a determination once made in a particular case * * *." *The Federalist Papers* No. 81, at 484 (C. Rossiter ed. 1961). Yet in the same paragraph Hamilton stated: "Nor is

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not exercise any "appellate" role; to the contrary, the judgment of the court was expressly made "final and conclusive." *Ibid.* Pinckney proposed carrying over this mechanism into the new Constitution. See III M. Farrand, *supra*, at 117 (Pinckney) ("The 9th article [of the Pinckney plan] respecting the appointment of Federal Courts, for deciding territorial controversies between different States, is the same with that in the [Articles of] Confederation."). The proposal was referred to the Committee of Detail, which produced a draft that reproduced the corresponding provisions of the Articles of Confederation almost verbatim. See II M. Farrand, *supra*, at 170, 183-184.

[17] The Convention rejected Pinckney's proposal in favor of placing interstate disputes in the original jurisdiction of the Supreme Court. See II M. Farrand, *supra*, at 400-401. The record of the Convention's debates indicates that the Pinckney proposal was thought to have been "rendered unnecessary by the National Judiciary now to be established" under Article III. *Id.* at 401. Pinckney himself had suggested as much when he first offered his proposal. See III M. Farrand, *supra*, at 117 ("this may with propriety to be left to the Supreme Judicial").

there any thing in the proposed Constitution * * * by which it is forbidden." *Ibid.* In Hamilton's view, "the impropriety of the thing, on the general principles of law and reason," not the Constitution, "is the sole obstacle." *Ibid.*

Nevertheless, it may be assumed the Framers intended the Constitution to insulate the actions of federal courts from *improper* interference by Congress. The question, however, is whether Section 27A(b) constitutes such an improper interference. The historical examples that excited the Framers' attention were far more intrusive than and quite different from Section 27A(b), because they were indistinguishable from the powers exercised by the courts themselves. See, *e.g.*, *The Federalist Papers*, No. 48, at 311-312 (J. Madison) (C. Rossiter ed. 1961) (describing practice of Virginia and Pennsylvania legislatures of "determin[ing]" cases and "decid[ing] rights that "should have been left to *judiciary controversy*"); Edward S. Corwin, *Court Over Constitution* 13-14 (1938) ("In 1787 judicial interpretation of the law was often not final even in the decision of cases, it being common practice for the legislature, in the exercise of a species of equity jurisdiction, to reverse decisions of the ordinary courts, to order cases retried or appeals granted, and even to adjudicate controversies itself."); *INS* v. *Chadha*, 462 U.S. 919, 961-962 (1983) (Powell, J., concurring) (describing historical examples of "trial by legislature," in which individuals' rights were determined in particular controversies by the state legislatures, and suggesting that it was "to prevent the recurrence of *such abuses* that the Framers vested the executive, legislative, and judicial powers in separate branches") (emphasis added). Those examples

are not comparable to the reopening remedy provided by Section 27A(b).

Indeed, a provision requiring the reopening of an otherwise final judgment in particular circumstances has long been part of federal law, and it has never been suggested that this provision violates the Constitution. 28 U.S.C. 1655 provides that a defendant who is not personally served (but is served by publication) in an action to enforce or to remove a lien upon title to real or personal property may, within one year after final judgment, "enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just." Under that provision, "an absent defendant who fails to appear and who was not personally served * * * can as of right have the judgment vacated within the year." *Equitable Life Assurance Society* v. *United States*, 331 F.2d 29, 37 (1st Cir. 1964). In *Perez* v. *Fernandez*, 220 U.S. 224 (1911), this Court enforced the predecessor of Section 1655.[18] The Court held that "the statute, without ambiguity, confers the right to have the case reopened wherever the jurisdiction of the court has rested upon publication." 220 U.S. at 231. The Court gave no suggestion that the statutory

[18] By the Act of Mar. 3, 1875, ch. 137, § 8, 18 Stat. 472, when a defendant was not given notice by personal service (but was served by publication) in an action to enforce or to clear a lien upon title to real or personal property, the defendant could enter an appearance within one year "and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein * * * and thereupon said suit shall be proceeded to final judgment according to law." See *Perez*, 220 U.S. at 229.

mandate that a final judgment be set aside violates the Constitution.[19]

Furthermore, Fed. R. Civ. P. 60(b), discussed at pages 34-35, *infra*, embodies longstanding principles providing for the setting aside of the final judgment of a federal district court in appropriate circumstances. Rule 60(b) and its historical antecedents reflect considerable development, over time, of the circumstances in which judgments may, and should, be set aside. See 7 James W. Moore, *Moore's Federal Practice* ¶¶ 60.09-60.27, at 60-65 to 60-306 (1993); see also 50 U.S.C. App. 520(4) (provision for setting aside judgments under Soldiers and Sailors Civil Relief Act). Article III does not bar Congress from identifying additional such circumstances and requiring, rather than permitting, relief from a judgment when, in its view, equitable considerations comparable to those that animated Rule 60(b) and its historical antecedents warrant that relief.

2. Because Section 27A does not threaten the separation of powers principles articulated in *Hayburn's Case*, it is not surprising that none of this Court's decisions applying those principles, see Pet. Br. 17-19, casts doubt on the constitutionality of Section 27A. The statutes at issue in most of those

[19] Section 1655 is not distinguishable on the theory that due process compels the reopening of a judgment when personal service has not been provided; publication is a constitutionally adequate means of giving notice when "it is not reasonably possible or practicable to give a more adequate warning." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Rather, Section 1655 is explicable solely as a response to equitable concerns perceived by Congress to weigh against the finality of a judgment—the same motives that prompted the enactment of Section 27A.

cases, unlike the one in *Hayburn's Case* itself, provided for executive or legislative review of decisions of *non*-Article III tribunals. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1864);[20] *In re Sanborn*, 148 U.S. 222 (1893); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). Presented with such statutes, this Court has accepted the exercise of executive or legislative review, as well as the initial assignment of adjudicatory tasks to non-Article III decision-makers, and has held only that the availability of executive or legislative review precludes judicial review by Article III courts.[21] In the remaining cases

[20] In discussing *Gordon*, petitioners (Pet. Br. 17) and their amici (Amici Br. 16 & n.7) cite the opinion of Chief Justice Taney. Although that opinion has been cited with approval, see *Williams* v. *United States*, 289 U.S. 553, 564 (1933), it was "not the opinion of the Court." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 569 (1962) (plurality opinion). Chief Justice Taney's opinion was written before the Court heard reargument in *Gordon* and was not published at the time that *Gordon* was decided. *Ibid.* The Court subsequently published it as an addendum to the United States Reports. See 117 U.S. at 697. The opinion of the Court in *Gordon* was likewise unpublished at the time the decision was announced, but was subsequently reproduced in *United States* v. *Jones*, 119 U.S. 477, 478 (1886).

[21] See *United States* v. *Ferreira*, *supra* (federal court hearing claims for which United States was liable under treaty with Spain, whose decisions were subject to review by Secretary of the Treasury, was not exercising judicial power, and no appeal lay to Supreme Court); *Gordon* v. *United States*, *supra* (Court of Claims judgments, which may be paid only after Secretary of the Treasury estimates the claim, are not the exercise of judicial power); *In re Sanborn*, *supra* (Court of Claims' resolution of facts, rendered on referral

cited by petitioners that apply the logic of *Hayburn's Case*, the Court concluded that there was no provision for executive or legislative revision at all.[22]

None of those cases has application here. Section 27A(b) does not authorize review of merits adjudications in securities cases by executive or legislative officials. Nor has any executive or legislative official claimed the right to make such a determination.

from Executive Department and reported back to that Department, is not within class of cases that are by statute subject to Supreme Court review); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 112-114 (federal court may not review administrative order granting or denying application for foreign air route, where the President has final authority to approve or disapprove agency's action). See also *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901) (declining to review Court of Claims decision in light of intervening legislation providing that Congress would not pay the judgment).

[22] See *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641 (1874) (government could not reduce judicially determined debt by setting off a tax claim that it had waived by failing to assert as a counterclaim); *United States* v. *Waters*, 133 U.S. 208, 213 (1890) (award of counsel fees to district attorney by Court of Claims was "a judicial act of a court of competent jurisdiction [and] was not subject to the reexamination and reversal of the Attorney General"); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-401 (1934) (under statute defining its jurisdiction, Court of Claims, when hearing tax refund claim, is required to resolve all elements of the claim; it cannot render a judgment subject to later proof of one element to the Commissioner of Internal Revenue). *ICC* v. *Brinson*, 154 U.S. 447, 468-476 (1894) (court enforcement of ICC subpoena is an exercise of judicial power) (Pet. Br. 17), and *Williams* v. *United States*, 289 U.S. 553, 564 (1933) (Court of Claims judges are not covered by Article III prohibition against diminution of compensation) (Pet. Br. 18), have no bearing on the present issue.

Rather, Section 27A(b) provides for the reopening of cases for further review within the Judicial Branch. Unlike a statute that gives final authority to determine the outcome of a case to another Branch, Section 27A contemplates final resolution of federal securities claims by the courts. In sum, the limited right conferred by Section 27A(b) to have a final judgment reopened does not violate the separation of powers.

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Congress has chosen to impose a statutory time limit on appeals from civil judgments of district courts. See 28 U.S.C. 2107 (Supp. IV 1992).[23] In this case, the time limit expired at midnight on September 15, 1993, 30 days after the district court entered its judgment dismissing Pacific Mutual's federal claims against petitioners.[24] At that instant, according to petitioners, the Due Process Clause

[23] Currently, the general time limit for civil appeals is 30 days. 28 U.S.C. 2107(a) (Supp. IV 1992). The original time limit set by the First Congress in the Judiciary Act of 1789 was five years. Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 84-85; see *The Dos Hermanos*, 23 U.S. (10 Wheat.) 306, 311 (1825).

[24] As noted above, the district court dismissed Pacific Mutual's state-law claims without prejudice, allowing Pacific Mutual to refile those claims in state court. See J.A. 1-2; Pet. App. B3. If the court had chosen to exercise its supplemental jurisdiction over the state claims (see 28 U.S.C. 1367 (Supp. IV 1992)), the time for Pacific Mutual to appeal the dismissal of the federal claims would not have begun to run, and the dismissal would not have been "final" for purposes of petitioners' due process theory, when Pacific Mutual moved to reinstate the federal claims under Section 27A(b).

transformed the district court's judgment into a "vested right" that Congress could not disturb. In petitioners' view, having enacted a statute limiting the time for review of the judgment, Congress could not enact another statute providing for the subsequent reopening of the judgment, without violating the Due Process Clause.

As we now show, that due process theory is incorrect. It rests on a concept of "vested rights" that cannot be reconciled with modern due process principles. And even if the view of "vested rights" expressed in the cases on which petitioners rely continues to have force, those cases show that an Act of Congress like Section 27A(b) does not impermissibly divest litigants of "vested rights."

A. The Due Process Clause Protects Property Interests, Not "Vested Rights"

1. Petitioners assert that they enjoy "vested property rights" in the judgment entered by the district court.[25] Pet. Br. 29. The concept of "vested

[25] It is worth noting the limited character of the right "vested" by the judgment in this case. Pacific Mutual's federal court action alleged common law fraud claims as well as statutory claims under Section 10(b). The district court dismissed the common law claims without prejudice, and those claims have since been refiled in state court. If Pacific Mutual prosecutes its common law claims successfully, petitioners will be exposed to much the same financial liability that they would have faced under the federal securities laws. Thus, taken on its own terms, the judgment does not purport to free petitioners from liability for fraud. Petitioners themselves claim only that the judgment gives them "freedom from the possibility of a *federal* claim." Pet. Br. 38 (emphasis added). None of the cases cited by petitioners establishes that a judgment that continues to expose the defendant to liability to the

rights," however, does not determine the limits on government action imposed by the Due Process Clause. The specific claim made by petitioners—that the Due Process Clause prohibits legislatures from disturbing "vested rights" in final judgments (Pet. Br. 29-49)—conflicts with the principles of this Court's due process jurisprudence.

The Due Process Clause provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." By its terms, the clause speaks of "life," "liberty," and "property," not "vested rights." See *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) ("[T]he word[s] 'vested right' [are] nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution."). Petitioners contend (Pet. Br. 29) that "vested rights" are a form of "property" for due process purposes. But they offer no general criteria, and the Due Process Clause supplies none, for deciding what rights are subject to "vesting" or how and when "vesting" occurs.

Even if it is assumed that "vested rights," however defined, constitute a form of "property" for purposes of the Due Process Clause, it does not follow that the Due Process Clause disables legislatures from disturbing them. On its face, the Due Process

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same plaintiff for the same underlying conduct creates a "vested right" of constitutional magnitude.

Clause does not prohibit deprivations of property at all; it merely requires that deprivations be accompanied by "due process of law." In the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related to the public ends of the law. See, *e.g.*, *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. at 2287 (citing cases).

By the same token, the Due Process Clause does not foreclose legislatures from affecting property interests even when the legislation acts retroactively. The burden of sustaining retroactive legislation under the Due Process Clause is "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989). It may well be that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation." *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). Nevertheless, "the test of due process" for the "retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose * * * by rational means." *Ibid.* Retroactive legislation that meets those standards satisfies the Due Process Clause "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16; *Romein*, 112 S. Ct. at 1112; *Sperry*, 493 U.S. at 64-65.

Petitioners contend (Pet. Br. 35-38) that while the Due Process Clause may permit legislatures to dis-

turb other forms of property retroactively, it absolutely disables them from retroactively disturbing "vested rights." Quite apart from the absence of any constitutional text supporting that claim, the distinction itself is unsound. All retroactive legislation upsets expectation interests to some degree. When a legislature imposes monetary liability retroactively, and thereby compels an individual to assume liability that did not exist when the relevant acts occurred, see, *e.g.*, *Usery*, 428 U.S. at 17, it is surely impinging on the individual's "property." No different effect can be ascribed to legislation that retroactively regulates "vested rights."

Petitioners assert that "modern due process jurisprudence" (Pet. Br. 33), far from repudiating vested rights principles, continues to embody them. But while petitioners cite (Pet. Br. 33-37) numerous decisions of this Court for that proposition, most of the cited decisions did not consider claims under the Due Process Clause at all.[26] Although *Ettor* v. *City of*

[26] The Court's decisions in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982); *Hodel* v. *Irving*, 481 U.S. 704 (1987); and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), all involved claims arising under the Takings Clause. *Coombes* v. *Getz*, 285 U.S. 434 (1932), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), involve claims under the Contracts Clause. *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981), involved a claim under the Ex Post Facto Clause. *Asiatic Petroleum Co.* v. *Insular Collector of Customs*, 297 U.S. 666 (1936), and *Bradley* v. *School Board*, 416 U.S. 696 (1974), involved issues of statutory construction, not constitutional claims. And none of those cases involved a claim that a vested right in a judgment was impermissibly changed.

Tacoma, 228 U.S. 148 (1913) (Pet. Br. 36), did involve a due process claim, its holding—that a State cannot repeal a statutory cause of action *pendente lite*—hardly represents a "modern" view of due process and is of doubtful validity today. Cf. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that [a] person has no property, no vested interest, in any rule of the common law."). And *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981) (per curiam), rejected a due process attack on a retroactive income tax statute; it did not endorse a theory of "vested rights."

Any suggestion that rights "vested" by a final judgment lie beyond the regulatory authority of Congress cannot be squared with this Court's decision in *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). In that case, landlords obtained valid state court judgments of eviction during a gap in the application of federal price control statutes. *Id.* at 101-102. When the price controls were reinstated, federal law made them retroactive and precluded evictions under the prior judgments. *Id.* at 102 n.3. Relying, as petitioners do here, on the theory that "the vested rights, created by the prior judgments * * * could not be destroyed by subsequent legislation," the landlords claimed that the law violated the Due Process Clause. *Id.* at 102. This Court rejected the claim that "vested rights" in "valid judgments" were immune from regulation:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through fore-

> handed contracts. * * * The rights acquired by judgments have no different standing.

Id. at 107. See also *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958) (*Fleming* holds that "any 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power").

If petitioners were correct in claiming that due process places rights "vested" in a judgment beyond government control, Fed. R. Civ. P. 60(b) would be constitutionally suspect. Rule 60(b) sets forth a variety of grounds that justify reopening of otherwise final judgments, and courts have exercised that reopening power in light of changes in the law. See *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989).[27] This Court as well has reopened a final judgment, when a change in legal terrain rendered the prior judgment inequitable. See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting second petition for rehearing, filed four Terms after certiorari had been denied, because of a change in decisional law governing eligibility for compensation, and because other victims of the same accident had won compensation awards in other courts). On petitioners' theory, the Constitution prohibits those inter-

[27] Petitioners note (Pet. Br. 48 n. 53) that many courts have declined to reopen a decision because of a change in the law. But they suggest no basis for believing that courts could not reopen particular cases for that reason, or that Congress could not amend Rule 60(b) to make that an express ground for reopening—especially where, as here, the change in the law operates to restore the law to what it was when the suit was filed.

ferences with "vested rights." Petitioners suggest (Pet. Br. 49) that the fact that courts can reopen final judgments does not justify similar action by the legislature. But the Due Process Clause is a general constraint on government action; it applies both to the courts and to Congress. If the Due Process Clause does not rigidly bar the reopening of judgments by courts, it does not rigidly bar reopenings under standards enacted by Congress.

2. Under the due process standards that govern review of economic legislation, Section 27A(b) is plainly constitutional. Section 27A as a whole is designed to protect the legitimate reliance interests of securities fraud plaintiffs who filed suit before this Court's decision in *Lampf* and whose actions were timely under the limitations periods in effect in their jurisdictions. Congress acted to prevent the manifest unfairness that would result if the change in the limitations period brought about by *Lampf* were applied "to those cases that were pending at the time that the decision came down." 137 Cong. Rec. S18,623-S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Congress was also concerned about the adverse impact of *Lampf* upon private enforcement of the securities laws.[28] Those goals are unquestionably legitimate ones, and Section 27A(b) is directly tailored to advance them.

[28] *See Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden, Chairman, SEC); *Securities Investors' Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breeden); *id.* at 21-24 (Chairman Breeden).

At the same time, given the circumstances surrounding the enactment of Section 27A(b), petitioners cannot plausibly claim that the statute prejudices any legitimate reliance interests on their part. Before this Court's decision in *Lampf*, the law of the Fifth Circuit, where this suit arose, made clear that claims under Section 10(b) of the Exchange Act were governed by state limitations periods. Far from disrupting settled expectations concerning the applicable limitations period, Section 27A gives effect to those expectations. When the Court retroactively mandated the application of a "1-and-3" rule in *Lampf* and *Beam*, Congress acted promptly to restore the pre-*Lampf* rule, enacting Section 27A in less than six months and requiring motions for reinstatement to be filed within 60 days. In this case, only a few months passed between the district court's dismissal of the Section 10(b) claims and the enactment of Section 27A. Under these circumstances, petitioners cannot (and, in any event, do not) maintain that they acted in reliance on the dismissal order, to the prejudice of their defense on the merits. Section 27A(b) thus does not pose the "problems of unfairness," *Romein*, 112 S. Ct. at 1112, that sometimes accompany retroactive legislation.[29]

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[29] Even if defendants could show in a particular case that they had relied on the finality of dismissal orders, it would not follow that Section 27A(b) is unconstitutional. This Court's due process decisions do not condition the constitutionality of retroactive legislation on an absence of reliance by the affected parties. See, *e.g.*, *Usery*, 428 U.S. at 16 (retroactive legislation that satisfies rational basis test is not unconstitutional even if it "upsets otherwise settled expectations").

At several points in their brief (*e.g.*, Pet. Br. 29, 36, 38), petitioners imply that Section 27A(b) violates not the Due Process Clause, but the Takings Clause of the Fifth Amendment instead. Petitioners did not invoke the Takings Clause below, nor does their petition for certiorari present the question whether Section 27A(b) violates the Takings Clause. See Pet. i. As a result, the issue is not properly before this Court. See *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531-1534 (1992). In any event, "[g]iven that [petitioners'] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe & Products of California, Inc.*, 113 S. Ct. at 2289, quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

All that has been "taken" from petitioners by Section 27A(b) is the "right," fortuitously bestowed by *Lampf* and *Beam*, not to litigate Pacific Mutual's federal securities claims. The financial burden of litigation is hardly the kind of deprivation that entitles litigants to compensation under the Takings Clause. See *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (litigation expenses are not part of just compensation); cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). The Takings Clause would not entitle petitioners to compensation by the federal government even if they are found to have violated the federal securities laws and are ultimately required to pay damages to Pacific Mutual. In that event,

the damages would be due to fraudulent acts that were illegal when committed and that gave rise to liability under already-existing federal laws. Reimposing liability to injured persons for actions that were tortious and unlawful when taken can hardly constitute a "taking" of "property" within the meaning of the Takings Clause. The object of that provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. at 227 (citation omitted). There is "no constitutionally compelled reason to require the Treasury to assume the financial burden," *id.* at 228, for the fraud, if any, committed by petitioners.

B. The "Vested Rights" Doctrine, Even If It Has Continuing Significance, Does Not Invalidate Section 27A(b)

As the foregoing discussion demonstrates, the Due Process Clause does not create a special category of "vested rights" in a judgment that are immune from congressional regulation. But even if this case were analyzed under the precedents cited by petitioners in support of the existence of a "vested rights" doctrine, Section 27A(b) passes constitutional muster.

As an initial matter, a judgment that rests on the statute of limitations, rather than an adjudication on the merits, does not vest any property rights of a character that bars further pursuit of the claim if procedures are made available for that purpose. Where a case is dismissed solely because it is time-barred under then-governing law, the creation of an avenue for adjudication of the merits "is not a case of an attempt retroactively to create a liability in

relation to a transaction as to which no liability had previously attached." *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931). In *Graham & Foster*, for example, the Court rejected a "vested rights" due process challenge to a statute that restored liability for taxes after the statute of limitations had run. Petitioners are in no better position to assert a "vested rights" claim simply because a court entered a judgment based on a statute of limitations defense. See *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (final dismissal of claimant's quiet title action against the United States on the ground that limitations period had expired would not divest the claimant of whatever property rights it possesses, which may be asserted in another proceeding).

Petitioners quote (Pet. Br. 30) the statement in *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), that "[i]t is not within the power of the legislature to take away rights which have been once vested by a judgment." But despite the breadth of that language, this Court has not foreclosed such legislative action in the unqualified fashion suggested by *McCullough*.[30] To the contrary, the Court has

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[30] Indeed, *McCullough*'s application of the "rule" described in the quoted statement to a trial court judgment that was on appeal conflicts with this Court's decisions, both before and since. In *McCullough*, the Court reviewed a Virginia law that rescinded the right of a bondholder to use coupons to pay state taxes, and instead required taxes to be paid in cash. 172 U.S. at 103-105, 122. The bulk of the Court's opinion sustained the bondholder's claim that the right to use the coupons was protected from state impairment by the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. 172 U.S. at 109-123. The language on which petitioners rely appears in

upheld a wide range of federal and state statutes that have divested litigants of the benefits of final judgments. See, *e.g.*, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Hodges* v. *Snyder*, 261 U.S. 600, 603-604 (1923); *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 477-478 (1899); *Freeland* v. *Williams*, 131 U.S. 405, 417-421 (1889); *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855). When the Court has cited *McCullough* in subsequent decisions, it has usually done so in the course of sustaining, rather than invalidating, legislation disturbing final judgments. See, *e.g.*, *Hodges* v. *Snyder*, 261 U.S. at 603. In short, *McCullough*'s "rule" that legislatures may not "take away rights which have been once vested

a section of the opinion that rejected the claim that the bondholder's action had to be dismissed because after the judgment was rendered in the trial court, and the case was on appeal, Virginia repealed the "statute authorizing this particular form of suit." *Id.* at 123. This Court's statement that the legislature cannot repeal the right to sue while a case is pending on appeal from a judgment conflicts with the recognition in *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110, that "a court must decide [a case] according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." See also *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226 (1921) (applying statute, enacted while case was on appeal, that eliminated tax refund claim). Modern cases recognize the same rule. See, *e.g.*, *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 712 (1974). The result in *McCullough* can be explained, however, as protecting the bondholder's right to enforce a contract with the State against state impairment by the withdrawal of a remedy.

by a judgment" has been honored most often in the breach.[31]

Petitioners concede (Pet. Br. 40-44) that *McCullough*'s nominally unqualified rule is, in fact, subject to a variety of exceptions. But they contend that Section 27A(b) does not come within any of the exceptions recognized by this Court. That claim is incorrect. This Court has squarely held that the "vested rights" doctrine does not invalidate legislation, like Section 27A(b), that directs the reopening and re-

[31] Petitioners characterize several subsequent decisions of this Court as "approv[ing] the *McCullough* doctrine." Pet. Br. 31. Those cases, however, do not assist petitioners. *Hodges* v. *Snyder*, *supra*, and *Stephens* v. *Cherokee Nation*, *supra*, involved legislation affecting final judgments, but they distinguished *McCullough* rather than relied on it. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), and *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932), did not involve final judgments at all. *Forbes* held only that a State could not retrospectively ratify the collection of tolls for passing through a canal when no tolls were due at the time. *Arizona Grocery* held that the Interstate Commerce Commission could not retroactively declare a rate to be unreasonable after having itself prescribed the rate; the decision did not turn on the Due Process Clause. Petitioners also err in contending (Pet. Br. 32) that *Stewart* v. *Keyes*, 295 U.S. 403, 416-417 (1935), involved "legislation analogous to Section 27A(b)." *Stewart* did not involve a final judgment. Moreover, the Court's holding—that it violated due process for a statute to revive a time-barred cause of action—is limited to the revival of otherwise time-barred suits "to recover real or personal property" from the titleholder. 295 U.S. at 417. That holding, even assuming it to be good law, see note 33, *infra*, has no application where title to real or personal property is not involved. See *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945) (rejecting due process attack on a statute lifting the bar of the statute of limitations in a pending securities fraud action).

examination of final judgments, even when the legislation is enacted after the judgments have become final and the reexamination results in a judicial reversal of the original judgment. *Paramino Lumber Co.* v. *Marshall*, 309 U.S. at 374-379; *Stephens* v. *Cherokee Nation*, 174 U.S. at 475-478; *Freeland* v. *Williams*, 131 U.S. at 416-421. And the Court has sustained such legislation not only when it provides for reexamination under the substantive legal standards that applied at the time of the original judgments, but also when it requires the application of new rules of decision.

In *Freeland*, for example, a land owner obtained a money judgment against a soldier who stole cattle during the Civil War. 131 U.S. at 406. In 1867, the Supreme Court of West Virginia affirmed the judgment, which rejected a defense based on the soldier's status as a belligerent. *Id.* at 407-408. In 1872, before the land owner had executed the judgment, West Virginia amended its constitution to provide that no person "shall be liable in any proceeding, * * * nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered," for military actions that were consistent with "the usages of civilized warfare" during the Civil War. *Id.* at 411.

The defendant in *Freeland*, invoking the new law, brought a bill to enjoin execution of the plaintiff's final judgment. 131 U.S. at 407-409. The plaintiff challenged the constitutionality of the law, raising the same kind of "vested right" argument that petitioners are advancing here:

> The proposition of the plaintiff * * * is, that by the judgment of the [trial court] he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment * * * is depriving him of property without due process of law * * *. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Id. at 417. This Court rejected the vested right claim and sustained West Virginia's power to annul the final judgment. *Id.* at 417-421. The Court explained that "[j]udgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties," may constitutionally be "subject[ed] to review, to reconsideration, to reversal and to modification by various modes," such as writs of error and bills of review. *Id.* at 418. The Court further held that the legislature could retroactively "remov[e] objections and obstructions" to such review procedures, even when the "objections and obstructions" consisted of the substantive legal rules that supported the original judgment. *Id.* at 419-420.

In concluding that due process of law did not preclude the expansion of opportunities for review of a judgment, even after the judgment became final, the Court stated that "[p]rior to the adoption of the 14th Amendment the power to provide such remedies, although they have interfered with what were called vested rights, seems to have been fully conceded." *Freeland*, 131 U.S. at 420 (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380 (1829); *Sampeyreac* v. *United States*, *supra*; *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88 (1834); and *Freeborn* v. *Smith*, 69 U.S. (2 Wall.)

160 (1864)). In *Watson*, the Court upheld a state statute that validated a deed, even though a prior final judgment had ruled the deed to be void. 33 U.S. (8 Pet.) at 89, 108-111. *Freeland* concluded that the longstanding acceptance of such statutes was not called into question by the ratification of the Fourteenth Amendment. 131 U.S. at 420.

The Court relied on the same reasoning in *Stephens*, a case decided after this Court's intervening statement in *McCullough*, 172 U.S. at 123, that legislatures may not "take away rights which have been once vested by a judgment." In *Stephens*, individuals obtained decrees of Indian citizenship from the United States Court for the Indian Territory. 174 U.S. at 476. The statute under which the suits were brought provided that "the judgment of the court shall be final." *Ibid.* After the judgments were entered, Congress enacted legislation permitting the losing parties to reopen the judgments by appealing them to this Court. *Id.* at 476-477. The individuals who had prevailed in the trial court attacked the retroactive legislation on the ground, *inter alia*, that it was "destructive of vested rights." *Id.* at 477. Citing *Freeland*, this Court summarily rejected that contention, stating that "the grant of a new remedy by way of review has been often sustained under particular circumstances." *Id.* at 478. The court dismissed the vested rights doctrine as inapposite where "the right asserted to be vested is only the exemption of the[] judgments from review." *Ibid.*

The Court applied the same principles again in *Paramino*. There, a federal agency issued a judgment denying compensation to a longshoreman under the Longshoremen's and Harbor Workers' Compensa-

tion Act.[32] 309 U.S. at 374-375. The longshoreman did not seek review of the judgment, which by statute became final 30 days later. *Id.* at 375. Five years later, Congress enacted a private bill "ordering the Compensation Commission to review [the] case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards 'to the contrary notwithstanding.'" *Ibid.* The defendant employer argued that the legislation violated the Due Process Clause. *Id.* at 377. Relying on *McCullough*, the defendant contended that "[t]he compensation award was a final adjudication vesting property rights" that were "not alterable by subsequent legislation." *Id.* at 372. This Court rejected the invocation of *McCullough*, reasoning that "the immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." *Id.* at 378.[33]

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[32] The agency determined that the longshoreman was entitled to a limited measure of compensation, but that his employer already had paid him the full amount due. 309 U.S. at 375.

[33] *Paramino*'s treatment of "the immunity obtained by the lapse of the time for review" parallels this Court's treatment of legislation that retroactively extends a statute of limitations. As a general matter, the Court has held that the Due Process Clause does not prohibit legislatures from retroactively reviving claims that have become barred by the running of a statute of limitations. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976). Just as the running of the limitations period does not give the defendant a "vested right" against legislation reviving the right to sue (*Chase*), so the running of a statu-

Section 27A(b) plays precisely the same role as the legislation upheld in *Freeland*, *Stephens*, and *Paramino*. In this case and others governed by Section 27A(b), the losing party failed to seek review of an adverse judgment within a statutory time limit imposed by the legislature, and the judgment became final as a result. Congress thereafter enacted legislation providing for further review by the courts, notwithstanding the finality of the original judgment, and it provided for the courts to apply a new rule of decision when doing so. This Court's decisions confirm the constitutionality of Section 27A(b) in each of these respects. They show that the "vested rights" doctrine does not foreclose the legislature from directing review after the statutory time for review has already run and the judgment has become final (*Paramino*), or from retroactively creating a review procedure that did not previously exist (*Stephens*). And they show that the legislature may direct the courts to reexamine their judgments not only to determine their correctness under the law that existed at the time the judgment was entered, but also to take account of subsequent, retroactive changes in the substantive rules of decision (*Freeland*). In sum, Section 27A(b) does nothing that this Court has not already sustained in *Freeland*, *Stephens*, and *Paramino*.

Petitioners argue (Pet. Br. 40, 43-44), however, that *Freeland*, *Stephens*, and *Paramino* are inapplicable because they did not involve the judgments of Article III courts. But none of those decisions

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tory time limit on appeal does not give the defendant a "vested right" against subsequent legislation reviving the right to review of the judgment (*Paramino*).

grounded its vested rights analysis in the non-Article III character of the tribunal that issued the original judgment.[34] Moreover, even if decisions of non-Article III federal tribunals, such as administrative agencies, were somehow assumed not to give rise to "vested rights," but cf. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), petitioners could not make that claim about the judgments of state courts, such as the court in *Freeland*. Petitioners offer no reason why the Due Process Clause should be held to accord the judgments of state courts any less protection than those of federal courts. *McCullough* itself, the case on which petitioners ground their vested rights claim, involved a state court judgment.

Petitioners attempt to distinguish *Freeland*, claiming (Pet. Br. 40, 44) that the original judgment in *Freeland* was not shielded by the Due Process Clause because it was a "void judgment." This Court, however, reached precisely the opposite conclusion: "the judgment * * * is *prima facie* a *valid* judgment." 131 U.S. at 417 (emphasis added). As for petitioners' suggestion (Pet. Br. 44) that *Freeland* turned on the purpose of quieting strife following the Civil War, they confuse West Virginia's reasons for enacting the new law with this Court's reasons for sustaining it. The Court's reasoning in *Freeland* rests squarely on the authority of legislatures to subject final judgments to further review by the courts; it

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[34] For example, in *Paramino*, this Court's due process analysis, 309 U.S. at 377-379, makes no reference to the fact that the original judgment had been issued by an administrative agency rather than an Article III court. In marked contrast, the Court did invoke the administrative nature of the tribunal in disposing of a separation of powers argument. See *id.* at 381 & n.25.

does not purport to frame a "quieting strife" exception to the vested rights doctrine. See 131 U.S. at 418-420. Finally, the suggestion (Pet. Br. 44) that *Freeland* was overruled *sub silentio* by *McCullough* is refuted by the fact that this Court has continued to cite *Freeland* as authority even after *McCullough*, for precisely the exception to the "vested rights" doctrine that applies here. See *Stephens*, 174 U.S. at 478.

In sum, Section 27A(b) is indistinguishable for due process purposes from the statutes upheld in *Freeland*, *Stephens*, and *Paramino*. It therefore meets the requirements of the Due Process Clause regardless of whether this Court treats the "vested rights" doctrine as a constitutional anachronism or, instead, as an aspect of current due process analysis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL GONSON
Solicitor

EDWIN S. KNEEDLER
Deputy Solicitor General

JACOB H. STILLMAN
Associate General Counsel

MICHAEL R. DREEBEN
Assistant to the Solicitor General

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission

BARBARA C. BIDDLE
SCOTT R. MCINTOSH
Attorneys

MARCH 1994

APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. III 1991), provides:

> (a) *Effect on Pending Causes of Action.*—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on Dismissed Causes of Action.*—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

(10)

FILED
MAR 28 1994

No. 93-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MORGAN STANLEY & CO., INC., GOLDMAN, SACHS & CO., ERNST & YOUNG, and SALOMON BROTHERS, INC.,
Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT PACIFIC MUTUAL LIFE INSURANCE CO.

RICHARD G. TARANTO
(Counsel of Record)
H. BARTOW FARR, III
FARR, SMITH & TARANTO
2445 M Street, NW
Washington, DC 20037
(202) 775-0184

STEWART M. WELTMAN
STEWART M. WELTMAN &
ASSOCIATES, P.C.
135 S. LaSalle Street
Chicago, IL 60603

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

The petition presents the following question:

"Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and the due process clause of the United States Constitution."

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-609

MORGAN STANLEY & CO., INC., GOLDMAN, SACHS & CO., ERNST & YOUNG, and SALOMON BROTHERS, INC.,
Petitioners,
v.
PACIFIC MUTUAL LIFE INSURANCE CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT PACIFIC MUTUAL LIFE INSURANCE CO.

STATUTE INVOLVED

Section 27A of the Securities Exchange Act, 15 U.S.C. § 78aa-1, provides:

> (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

STATEMENT

1. District Court Proceedings Before Section 27A.

In March 1991, respondent Pacific Mutual filed this action in the United States District Court for the Northern District of Texas, seeking damages for securities fraud committed by petitioners, who are various investment bankers and accountants.[1] The complaint alleged that petitioners had made various false or misleading statements in connection with certain securities transactions relating to the merger of Interfirst Corporation and RepublicBank Corporation. In addition to common-law fraud, the complaint asserted violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated under that section. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

Petitioners moved to dismiss on various grounds, but they did not invoke any statute-of-limitations defense. Pet. App. A3. The Fifth Circuit had held that, in the absence of a federal limitations period applicable to 10b-5 actions, such actions were subject to the four-year statute of limitations borrowed from the law of Texas.

[1] Pursuant to Rule 29.1 of the Rules of this Court, Pacific Mutual states that it has no parent corporation and that its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation).

Ibid. The suit, brought in March 1991 to recover for fraud committed in late 1987, was timely under that rule.

On June 20, 1991, while the motions were pending, this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). The *Lampf* decision held that 10b-5 claims are governed by a "1-and-3-year" statute of limitations: suit for fraud must be brought within one year of discovery or three years of the fraud, whichever is earlier. 111 S. Ct. at 2782. The *Beam* decision made clear that, once a new judicial interpretation is applied to the parties in the case where it is announced, it must also be applied to other pending cases. 111 S. Ct. at 2446, 2448. The *Beam* ruling applied to the new 1-and-3-year rule because the Court in *Lampf* applied the rule to the parties before it. *Lampf*, 111 S. Ct. at 2782; *id.* at 2785-86 (O'Connor, J., dissenting).

On July 9, 1991, based on the newly applicable limitations period under *Lampf* and *Beam*, petitioners asked the district court in this case to dismiss the complaint as untimely. The district court granted the motion on August 16, 1991, noting that the suit was filed more than three years after the challenged fraud. *See* Pet. App. A4. As amended, the judgment of dismissal was entered on September 6, 1991, giving Pacific Mutual until October 6, 1991, to file a notice of appeal. *See* Fed. R. App. P. 4; Fed. R. Civ. P. 58. Having no sound basis for an appeal under then-applicable law, Pacific Mutual did not appeal.[2]

2. District Court Proceedings After Section 27A.

Less than four months later, on December 19, 1991, Congress enacted Section 27A of the Securities Exchange

[2] The common-law fraud claims, unlike the claims under federal securities law, were dismissed without prejudice. Pacific Mutual subsequently filed its common-law fraud claims in state court. J.A. 15 n.4.

Act (Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387) to address the problem caused by *Lampf*'s retroactive application to previously filed cases. The Act provided that 10b-5 actions commenced before the date of the *Lampf* decision (June 20, 1991) would be governed by the pre-*Lampf* limitations period applicable in the jurisdiction where suit was filed. Subsection (a) applied this limitations rule to cases still pending. Subsection (b) applied the limitations rule to cases, like this one, that had been dismissed under *Lampf*, allowing the plaintiff 60 days to seek reinstatement so that litigation on the merits of the complaint could proceed. Petitioner Morgan Stanley's General Counsel, testifying on behalf of the Securities Industry Association, far from raising any constitutional or even fairness objections, had urged precisely this result to Congress.[3]

Pacific Mutual filed for reinstatement on January 31, 1992. J.A. 5-8. In responding, petitioners did not dispute that the suit would be timely under the limitations period made applicable by Section 27A(b). *See* Pet. App. B5. Instead, they argued that Section 27A(b) is unconstitutional. J.A. 9-25. Specifically, they contended that Section 27A(b) "unconstitutionally encroaches on the powers of the judicial branch" (J.A. 10, 17) in two ways. First, petitioners argued, Congress had impermissibly directed a decision in a defined class of cases, thus violating the principle of *United States v. Klein*, 80 U.S. 128, 146-47 (1871). J.A. 16-20. Second, they urged.

[3] The SIA witness opposed an early proposal that made a new 3-and-5-year limitations period retroactive, deeming it unfair to defendants in cases "that were time-barred even under pre-*Lampf* standards. SIA strongly urges that the timeliness of all cases pending at the time of the *Lampf* decision—whether or not those cases since have been dismissed—should be determined by application of the law as it stood at that time." *Securities Investors Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 91-92 (1991); *id.* at 77-78. The statement, like Section 27A(b), makes no distinction between "final" dismissals and those on appeal.

Congress had impermissibly disturbed final judgments, thus violating the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). J.A. 16, 19-23. Petitioners did not mention the Fifth Amendment, although they used the phrase "vested right." J.A. 16.

The district court held Section 27A(b) unconstitutional and thus denied reinstatement of the 10b-5 action. Pet. App. B1-B15. The court first rejected petitioners' *Klein* argument, observing that, like the statute upheld in *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992), Section 27A(b) changes the substantive law rather than usurps judicial power by commanding decisions. Pet. App. B7-B8. The court went on, however, to accept petitioners' argument that every final judgment creates a "vested" right that cannot be disturbed by legislation. *Id.* at B7, B8-B9, B14. The court also found Section 27A(b) invalid on the ground, concededly not urged by petitioners (Pet. App. B11), that even Congress could not deny retroactive application to the *Lampf* rule because *Beam* mandated retroactive application "as a constitutional matter." Pet. App. B14; *see id.* at B11-B14.

3. The Court of Appeals Decision.

The court of appeals reversed. Pet. App. A1-A33. Most of the court's discussion focused on petitioners' "vested rights" contention, now made as a substantive due process argument. Noting that retroactive legislation comports with due process if the retroactive application is justified by a rational legislative purpose (Pet. App. A19-A20, A25), the court found no proper basis for petitioners' assertion that "the rights created by judgments are sacrosanct above other due process rights." Pet. App. A20. The court then held that Section 27A(b) readily passes the rationality test, and indeed survives any heightened scrutiny as well, because petitioners' "conduct would not have been different if they would have foreseen § 27A(b)" and the statute affirmatively

"honor[s] the expectations of plaintiffs *and* defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*." Pet. App. A25 (emphasis added). The court of appeals likewise rejected petitioners' claim that Section 27A(b) "usurps judicial authority" in violation of Article III of the Constitution (Pet. App. A30), observing in particular that "§ 27A(b) takes no authority from the judiciary" and "leaves the final resolution of securities-fraud disputes to the courts." Pet. App. A31; *see id.* at A30-A33.

SUMMARY OF ARGUMENT

I. *Separation of Powers.* As relevant to this case, the Constitution's separation of powers imposes two complementary constraints on Congress in enacting a statute. First, Congress may not assign a non-judicial function to the Article III courts. Second, Congress may not itself undertake to exercise the "judicial power," impairing the functions left to the courts. Section 27A(b) cannot be faulted by petitioners on either ground.

The first prinicple is "the principle of *Hayburn's Case*," which is the sole basis of petitioners' separation-of-powers argument. *See* Pet. Br. 11. But that principle applies only to statutes in force at the time of a requested judicial decision, where the statute deprives the dispute of its character of a "case or controversy" by asking the court to make a decision that it knows is ineffective on its own in granting relief, but instead is merely a first step in a process requiring some further independent determination by the executive or legislative branches. In that situation, this Court has often held that the Article III courts must decline jurisdiction. The principle, however, has no application to, and has never been invoked to invalidate, a statute enacted *after* a final judgment has been rendered, based on the statute's effect on the prior judgment: such a post-judgment statute can have no effect on the "case or controversy" character of the judicial decision

at the time it was made. *Hayburn's Case* and its successors thus offer no support for petitioners' challenge to Section 27A(b) as impermissibly disturbing preenactment judgments.

The second relevant separation-of-powers principle, forbidding congressional exercise of the judicial power (with concomitant impairment of the courts' power), is properly not a matter of *Hayburn's Case* principles at all, but instead addressed by whatever doctrine is established by this Court's decision in *United States v. Klein, supra.* Petitioners have made no *Klein* argument, however, recognizing that no such argument could succeed. *See Robertson v. Seattle Audubon Soc'y, supra.* But even if this second principle could properly be associated with *Hayburn's Case*, Section 27A(b) would have to be upheld. Congress has not itself engaged in adjudication, but has merely altered the applicable law of limitations, and left for the courts the entire task of applying the governing law to the facts of particular cases and rendering decision. Congress therefore crossed no line defining the types of powers it may exercise in relation to judicial cases.

II. *Due Process.* Section 27A(b) readily meets the standard for assessing due process challenges to retroactive statutes that upset settled expectations. It is permissible for Congress to enact such statutes as long as the retroactive aspect rationally serves a legitimate purpose. *See, e.g., General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Section 27A(b) meets that test because it rationally serves to protect the reliance interests of plaintiffs who sued under pre-*Lampf* understandings of the governing statute of limitations, while ensuring that a whole class of defendants accused of securities fraud are not allowed to escape liability without even having to answer the fraud charges. Indeed, these purposes, together with the implausibility of the

claim that Section 27A(b) actually upsets legitimately settled expectations at all, mean that Section 27A(b) survives due process scrutiny under any standard short of an absolute rule protecting "final judgments."

Petitioners make no sound case for such a rule, either generally or as applied here. This Court's precedents, which include a host of decisions that uphold laws disturbing final judgments, will not support a general rule of sanctity for final judgments. Fed.R.Civ.P. 60(b) and its precursors are inconsistent with such a rule. The basic interest at stake under the due process clause here, in protecting settled expectations, does not even justify categorically special, much less absolute, protection for judgment-based rights in preference to other forms of property rights. And petitioners' suggested rule would have the perverse result of penalizing plaintiffs who are diligent enough to press their rights and responsible enough to refrain from pursuing merely dilatory appeals.

In any event, if there are any judgments that warrant any special protection against legislative disturbance, the judgments affected by Section 27A(b) are not among them. These judgments, entered only months before the legislation was enacted, had no effect but to relieve alleged malefactors of having to answer fraud charges on their merits, based entirely on a determination that the suits were not timely filed—under an interpretation of the governing statute of limitations that itself was unexpected. The statute then simply removed the limitations objection from the case. There is no justification for an absolute, or even distinctively stringent, bar to legislation that thus reaches briefly back in time to eliminate a procedural defect to the consideration of serious charges on their merits, even if that defect resulted in an unappealed judgment.

ARGUMENT

Petitioners could not dispute the strength or legitimacy of Congress's purpose in enacting Section 27A(b)—to remove a procedural obstacle, resulting from a wholly unexpected change in applicable limitations periods, to the adjudication of securities-fraud claims on their merits. Instead, petitioners argue for an absolute constitutional rule rendering (some) final judgments sacrosanct: no matter how good the reason, "Congress may not strip a private litigant of the vested right to a final judgment rendered by a court of the United States." Pet. Br. 10. As applied in this case, petitioners argue, the suggested rule constitutionally entitles them to the preclusive effect of their judgment of dismissal so as to immunize them from having to answer the securities-fraud charges, even though Congress has (for unassailable reasons) made the sole basis of the dismissal—a statute of limitations—no longer applicable to the claim.

Petitioners rest this claim for a rule of sanctity of (certain) final judgments, and its application to invalidate Section 27A(b) in this case, on two constitutional constraints on congressional action. The first is the Article III principle reflected in *Hayburn's Case* and its progeny. The second is the due process clause of the Fifth Amendment.[4] But neither of those sources can sup-

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[4] Petitioners' brief phrases the due process argument as a claim about "the Fifth Amendment" (Pet. Br. 29) in an apparent effort to justify reliance on cases decided under the Takings Clause (*id.* at 35, 37). But the question presented in the petition for a writ of certiorari is by its terms limited to the "separation of powers doctrine and *the due process clause*." Pet. i (question presented) (emphasis added); *see also* Pet. 13, 16 (due process). A takings claim is distinct from, and not encompassed within, a due process claim. *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *see also id.* at 1531-34 (even a regulatory taking claim is different from, and not encompassed within, a physical taking claim). Accordingly, no takings claims is presented here.

In any event, if petitioners' due process attack on Section 27A(b) fails, as it does, the argument would fare no better re-

port petitioners' claim that Section 27A(b) is unconstitutional.

I. SECTION 27A(b) DOES NOT VIOLATE THE ARTICLE III PRINCIPLE OF *HAYBURN'S CASE*.

Having abandoned their earlier contention that Section 27A(b) is invalid under *United States v. Klein*, petitioners rest their entire separation-of-powers argument now on "the principle in *Hayburn's Case*." Pet. Br. 11 (Argument Heading I).[5] The contention that the constitutional doctrine of *Hayburn's Case* invalidates Section 27A(b) because the statute upsets a final judgment, however, is wrong for two independently sufficient reasons. First, the argument misunderstands *Hayburn's Case* and its progeny, which merely bar the Article III courts from *accepting jurisdiction* over certain disputes—namely, where the court knows, because of statutes in place *at the time*, that its judgment cannot itself afford relief. That principle provides no ground for *striking down a statute*, like Section 27A, enacted *after* a judgment: the "case or controversy" or "judicial" character of a judicial decision is not affected by a later-enacted statute. Second, even if petitioners were permitted to challenge the validity of this post-judgment statute as representing an improper exercise of judicial power, or impairment of the courts' function, by Congress—which is properly not a concern of *Hayburn's Case*, but instead of *United States v. Klein*,

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packaged as a takings claim. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986); *see also United States v. Sperry Corp.*, 493 U.S. 52 (1989).

[5] As to *Klein*, *see* Pet. Br. 27 n.31; C.A. Br. for Appellees at 6 n.3 (in Fifth Circuit, petitioners preserved *Klein* point in one sentence, but made no argument). As the district court held, any such argument would fail because Congress prescribed a rule of law for the courts to apply, and thus exercised its own legislative power, when it enacted Section 27A(b); it did not assume the exercise of judicial power by directing judicial decisions. *See Robertson v. Seattle Audubon Soc'y*, *supra*.

a decision abandoned by petitioners as a basis for their challenge—petitioners' separation-of-powers argument would still fail. Congress in Section 27A did not make any adjudicatory decisions, but changed the law and left findings of fact, interpretation of law, and decision to the courts.

A. 1. *Hayburn's Case* was the beginning of a long line of authority establishing that Article III courts—restricted to the exercise of "judicial" power in "cases" or "controversies" (Art. III, §§ 1, 2)—may not be given functions that are not "judicial" in nature, including the rendering of advisory opinions. *See* 2 U.S. (2 Dall.) at 411-14.[6] Under the resulting doctrine, a court's task is not judicial in the constitutional sense if, *at the time it is asked to rule*, the statutes defining its jurisdiction render the court unable to give concrete relief, but instead treat the judicial decision as only the first step in a process requiring subsequent independent affirmative action to be taken by the Executive or Congress. Article III courts may not make such a decision.

In *Hayburn's Case*, for example, the circuit courts were directed to rule on veterans' pension claims, but the ruling was merely to be transmitted to the Secretary of War for the Secretary, and ultimately Congress, to decide if the claim should be paid. 1 Stat. 243 (1792). The opinions of several Justices, sitting as Circuit Judges, explained that the assigned task was not "judicial" because the statute defining the task subjected the decision, before it could have any effect, to the revision of non-Article III authorities. 2 U.S. (2 Dall.) at 411-14. The result was that the assigned task, amounting to performing the role of commissioners in an executive process, could not be accepted by an Article III court.

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[6] *See, e.g.*, L. Tribe, *American Constitutional Law* § 3-9, at 73 & nn. 2, 4 (2d ed. 1988); C. Wright, *Federal Courts* § 12, at 56-59 (4th ed. 1983).

The same circumstance—namely, that the jurisdiction-defining statute itself limited the court's power to grant relief—was present in every one of the other cases cited by petitioners (Pet. Br. 16-19) in which the Constitution was held to preclude jurisdiction in the Article III courts. In *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), the Supreme Court dismissed, "for want of jurisdiction," an appeal from a damages award rendered by a district judge under a statute that expressly made the award subject to the post-judgment redetermination of the Secretary of the Treasury. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), the Court held that, as an Article III court, it could not take jurisdiction over an appeal from a decision by the Court of Claims because the statute giving jurisdiction to the Court of Claims by its terms gave the Executive the authority " 'to revise all the decisions of that court requiring payment of money.' " *United States v. Jones*, 119 U.S. 477, 478 (1886) (quoting Chief Justice Taney's explanation in announcing judgment in *Gordon*); *see Gordon*, 117 U.S. 697, 703 (1885).[7] In *In re Sanborn*, 148 U.S. 222 (1893), the Court likewise held that it could not take jurisdiction over an appeal from certain Court of Claims decisions that were still subject to non-Article III revision.[8] And in *Chicago & Southern Air Lines, Inc. v.*

[7] Immediately after *Gordon* was decided, Congress repealed the provision subjecting the relevant Court of Claims decisions to executive revision, and those decisions thereby became fit for Article III review. *United States v. Jones, supra; see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

[8] In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), the Court confirmed the principle of this line of cases when it held that it must dismiss an appeal because Congress had repealed the cause of action, making relief impossible. In *Muskrat v. United States*, 219 U.S. 346, 352-55 (1911), the Court again relied on the principle established in *Hayburn's Case*, *Ferreira*, and *Gordon* to hold that an Article III court may not render a purely advisory opinion (on a statute's constitutionality), where the decision would furnish no concrete relief. *See also United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Article III courts cannot "give

Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948), the Court held that Article III courts could not take on cases about the propriety of a Civil Aeronautics Board decision on the award of a foreign air carrier route, where the resolution of such a case, under the statute in place at the time, "ha[d] only the force of a recommendation to the President." *Id.* at 113.[9]

These cases thus establish a constitutional constraint on the jurisdiction assumable by Article III courts, *barring* such *jurisdiction* where statutes in place at the time of decision limit the court's relief authority and thereby make the decision requested of the courts something other than the "judicial" resolution of a "case or controversy." In this case, however, there was at all times a live case or controversy for the district court to resolve. The dis-

or review judgments" that, at the time, are "conditioned" on agency revisory authority).

[9] The other cases cited by petitioners are of no help to them on the constitutional issue. For example, *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), held that once Congress had made the Court of Claims' cases into Article III controversies, subject to Supreme Court review, the *statute* meant that the Executive lacked authority to revise a Court of Claims judgment before paying it. *United States v. Waters*, 133 U.S. 208 (1890), likewise turned on a statutory conclusion. *ICC v. Brimson*, 154 U.S. 447 (1894), merely confirmed the ICC's authority to seek judicial enforcement of a subpoena. *Williams v. United States*, 289 U.S. 553 (1933), and *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), involved the problem of "legislative" courts; and the latter specifically found *no* problem under *Hayburn's Case* (370 U.S. at 582). *Mistretta v. United States*, 488 U.S. 361 (1989), involved rulemaking, not the adjudicatory judgments of Article III courts. *United States v. Mitchell*, 463 U.S. 206 (1983), involved the scope of a waiver of sovereign immunity and substantive liability of the United States.

The Court's decision in *United States v. Sioux Nation*, 448 U.S. 371 (1980), of course, *rejected* a claim based on *Hayburn's Case*. *Sioux Nation* is discussed below.

trict court had one set of laws to apply prior to *Lampf*, another set in the months after *Lampf*, and still another set after Congress restored the pre-*Lampf* limitations period. At every moment, however, the task for the court was entirely judicial in the fullest constitutional sense: the court's determination could itself provide relief, without need for further independent action by any non-Article III authority. Accordingly, there is no *Hayburn's Case* problem barring the district court from assuming jurisdiction, or having assumed jurisdiction, in this case.

2. Nevertheless, petitioners' entire separation-of-powers argument is that the principle of *Hayburn's Case* establishes a ground for invalidating statutes because of their effect on already-final judgments, even if those judgments, when rendered, resolved a perfectly proper case or controversy. *Hayburn's Case*, however, has never been so applied. Petitioners all but acknowledge this when they remark that "*Hayburn's Case* and its progeny are generally used to strike down statutes that provide for potential legislative or executive review of the future judgments of a tribunal." Pet. Br. 16. In fact, *every* one of the constitutional cases involved a statute creating the "potential" for non-Article III revision at the time of the judicial decision—indeed, the *need* for a non-Article III determination to afford relief. And in every such case, the Court's disposition was simply that the Article III courts could not take jurisdiction. In none of the cases did the Court invalidate, or even rule that it would be proper under *Hayburn's Case* to invalidate, a subsequently enacted statute, as petitioners seek here, because of its effect on a prior judgment.[10]

[10] *United States v. Klein*, due process, and perhaps other constitutional principles (*e.g.*, double jeopardy, full faith and credit) may set limits on subsequent legislation affecting judgments as such. With petitioners having properly abandoned their earlier contention under *Klein*, however, the only such argument raised by petitioners is their substantive due process challenge, which is considered below. Whatever the merits of any such arguments, they have nothing to do with the separation-of-powers principle of *Hayburn's Case*.

The *Hayburn's Case* principle not only never has meant, but could not mean, that Congress is barred from upsetting "a final judgment rendered by a court of the United States." Pet. Br. 10. For one thing, if the focus of *Hayburn's Case* were on the post-judgment action of executive or legislative authorities, then there would be no violation in all those situations where the judicial determination is simply ratified. But that is plainly not the law. *Hayburn's Case* does not require a wait-and-see approach, with post-judgment action by Congress or the Executive determining constitutionality. Rather, it is the known need for a later independent non-Article III determination, at the time of judicial decision, that creates the constitutional problem of a "non-judicial" task, making Article III jurisdiction improper regardless of any later action by another branch. That problem does not arise with a post-judgment statute if the judgment, when rendered, resolved what was then fully a case or controversy.

Indeed, petitioners do not deny that Congress is free to alter the law, rendering lawful certain conduct that was previously found to be unlawful and enjoined, and thereby compelling modification of the injunction judgment. *See Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S. (18 How.) 421 (1855); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870). Yet, as petitioners recognize when they observe that for Article III purposes "[a] judgment is a judgment" (Pet. Br. 27), the *Hayburn's Case* principle does not distinguish between judgments according to whether forward or retrospective relief is the subject of the case. For example, the principle of *Hayburn's Case* was fully applied in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., supra*, where the relief sought was a purely prospec-

tive order confirming a future entitlement to an air carrier route. If a statutory inability to grant relief makes a court's task non-judicial at the time of decision, the decision is not a constitutionally proper one for an Article III court to make, regardless of the type of relief sought.

The enactment of a statute affecting a previously rendered judgment, by contrast, does not implicate the principle underlying *Hayburn's Case*, because the character of a dispute as a "case or controversy" proper for "judicial" resolution cannot, as a logical matter, be altered by a post-judgment statute. That is why no *Hayburn's Case* problem arises with this Court's longstanding rule, beginning with *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), that a new statute must be applied while a case is on appeal, even in this Court (if the law is intended to be applicable to such cases). Pet. Br. 21-23.[11] In that situation, the enactment of the new law does not somehow retroactively render the lower court decisions merely advisory. The enactment of a new law after all appeals are exhausted is no different in terms of the case-or-controversy principle of *Hayburn's Case*: such a law no more renders the earlier judicial decisions "non-judicial" in nature.

Only a statute that, at the time of decision, makes the judicial determination "subject to later review or alteration" before relief can be obtained violates the principle of *Hayburn's Case* and thus justifies refusal to accept jurisdiction. *Chicago & Southern Air Lines*, 333 U.S. at 114. There was no such statute in this case. Accordingly, there is no warrant in *Hayburn's Case* for invalidating Section 27A(b).

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[11] In *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, *modified*, 331 U.S. 795 (1947), this Court applied that rule even after it rendered its decision, modifying its judgment to allow consideration of an intervening statute. *See* Pet. App. A32-A33.

B. Petitioners' argument under the principle of *Hayburn's Case* would fail even if that principle were treated as a possible ground for invalidating congressional action that revises an earlier judgment—a use to which this Court has never put the principle, which is outside the "case or controversy" rationale underlying it, and which is properly the concern of *United States v. Klein* rather than *Hayburn's Case*. Even so, however, the rule would apply, at most, only when Congress acts "as a court of errors," because only then can Congress be deemed to be usurping or impairing the courts' "judicial power." 2 U.S. (2 Dall.) at 410 n.1. *See United States v. Sioux Nation*, 448 U.S. at 427 (Rehnquist, J., dissenting) (Congress " 'may not itself exercise an appellate-type review of judicial judgments' "). Congress cannot be accused of assuming or interfering with the "judicial power" unless, at a minimum, it is engaging in adjudication, undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision"—these being "necessary . . . conditions for the exercise of federal judicial power." *Freytag v. Commissioner*, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring).[12] But Congress did no such thing when it enacted Section 27A(b).

Section 27A(b) is an exercise of legislative power: it changes the substantive rule of law for a generally defined set of circumstances and then leaves to the Article III courts the application of that rule in specific cases. Congress in Section 27A(b) did not find any facts about particular plaintiffs, did not interpret the *Lampf* statute of limitations or apply it to any plaintiffs, and did not even apply the newly enacted statute of limitations to particular plaintiffs—much less arrive at any decision, on any ground, fixing particular parties' rights. Adjudication

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[12] In all of the cases following *Hayburn's Case*, the contemplated post-judgment executive or legislative action was a case-specific determination, without change of substantive law. *See, e.g., Chicago & Southern Air Lines* (award of air route); *Ferreira* (damages award); *Hayburn's Case* (pension claim).

is left by Section 27A(b) to the courts, which must then follow the law that Congress is entitled to make to govern their proceedings. Thus, far from exercising "appellate-type review" by reversing judgments on the basis of existing law, or making any case-specific determinations of the result of particular disputes, Congress enacted new law and left the judicial power in the Article III courts.[13]

This Court has upheld much more case-specific legislation providing for reopening of otherwise-final judgments than Section 27A(b)—even reopening judgments in purely monetary cases. In particular, Congress specifically directed the reopening of an identified judgment of an Article III court in *United States v. Sioux Nation*, 448 U.S. 371 (1980).[14] This Court upheld the measure because Congress had changed the applicable law so as to remove a "non-merits" defense from the case, leaving resolution of the "merits," including all necessary fact-finding and application of law, to the courts.[15] The same

[13] "The legislature is not setting aside the court's original determination, which is final as to the law then existing. It is merely deciding that prior claimants should have another opportunity to file and to litigate their claims under a new and different set of standards." *State ex rel. Huntington Rubber Mills v. Sulmonetti*, 557 P.2d 641, 644 (Ore. 1976).

[14] *Sioux Nation* and *Cherokee Nation v. United States*, 270 U.S. 476 (1926), involved judgments of the Court of Claims, which was an Article III court. 28 U.S.C. § 171 (1976 ed.); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

[15] The Court reasoned that the law, which commanded consideration of the merits of the claim without regard to a preclusion defense that had already finally been held dispositive, constituted a waiver by the United States of its own defense. 448 U.S. at 395-405. In accord with this Court's recognition elsewhere that separation-of-powers protections of the Article III courts are not freely waivable (*CFTC v. Schor*, 478 U.S. 833, 851 (1986)), a separate section of the opinion in *Sioux Nation* rejected the *Hayburn's Case* argument without reference to the "waiver" notion. 448 U.S. at 406-07. The Court explained that the new claim was "in pursuit of judicial enforcement of a new legal right"—namely,

is true for Section 27A(b). Accordingly, in this case—as in *Sioux Nation*, as in the injunction cases (*e.g., Wheeling & Belmont Bridge*), as in cases upholding laws upsetting the finality of judgments of territorial courts or administrative tribunals[16]—the post-judgment legislation does not effect any improper impairment of the judicial function, and there is no threat to the structural or liberty-preserving values of judicial independence that Article III protects. *See CFTC* v. *Schor*, 478 U.S. 833, 848-50 (1986).

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Petitioners' second challenge to Section 27A(b) repeatedly invokes the notion of "vested rights." Pet. Br. 10, 29-49. But as this Court pointed out more than 100 years ago, there is no "vested rights" clause in the Constitution. *Campbell v. Holt*, 115 U.S. 620, 628 (1885).[17] Petitioners' claim, which is made under the due process clause of the Fifth Amendment, must be judged according to the substantive due process standards applicable to retroactive legislation. Section 27A(b) readily satisfies

the original takings claim minus the previously dispositive *res judicata* defense—and that Congress had not reviewed the "merits of the Court of Claims' decisions," but had left to the Court of Claims all factfinding and "application of generally controlling legal principles to those facts." *Ibid.*

[16] *See, e.g., Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222 (1833).

[17] "It is to be observed that the word 'vested right' is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution." 115 U.S. at 628.

those standards. And there is no basis for a wholly different rule giving sacrosanct or even categorically special status to laws that upset otherwise-final judgments, either generally or, even more particularly, for the type of judgment at issue in this case.[18]

A. The standard governing the assessment whether retroactive legislation violates due process is by now firmly established. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992), quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). *See also United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Usery v. Turner Elkhorn Mining Co.*,

[18] In light of petitioners' reliance on cases decided under other constitutional provisions (*e.g.*, Pet. Br. 35, 37), we note that other constitutional provisions that have some bearing on "retroactive legislation" provide no help to petitioners. For example, the Ex Post Facto Clause (art. I, § 9, cl. 3) applies only to criminal laws. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The Bill of Attainder Clause (art. I, § 9, cl. 3) applies at most only to laws singling out identified persons for punishment for past conduct. See *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-76 (1977). The Contract Clause (art. I, § 10, cl. 1) is not applicable to Congress or to rights not resting on a contract; moreover, statutes like Section 27A(b) that *restore* parties to their reasonable expectations, rather than defeat contractually fixed expectations, have been upheld under the Contract Clause. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 419-20 (1983); *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965). Finally, no takings claim is made here, and any such claim would fail if due process presents no barrier to Congress's action removing the limitations bar to the litigation of the fraud claims on their merits. *See* note 4, *supra*.

428 U.S. 1 (1976). This test thus recognizes that settled expectations *can* constitutionally be upset, as long as the legislature is rationally pursuing a legitimate objective in doing so. *See Usery*, 428 U.S. at 16 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations") (citing numerous cases); *R.A. Gray & Co.*, 467 U.S. at 730 ("burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose").

That standard is readily satisfied here. It was entirely legitimate for Congress to seek to protect the expectation interests of the thousands of plaintiffs who had relied on pre-*Lampf* limitations periods and pursued securities fraud claims, but had just recently had their cases dismissed (whether or not they had appeals pending), while at the same time preventing a host of alleged malefactors from escaping even having to answer fraud charges for which they might be liable in amounts in the billions of dollars. *See Securites Investors Legal Rights, supra*, at 3-6; 137 Cong. Rec. S18,623-24 (Nov. 27, 1991) (statement of Sen. Bryan). And the means adopted, recommended to Congress by the securities industry (note 3, *supra*), were precisely tailored to achieve those objectives. Indeed, as the court of appeals pointed out (Pet. App. A25), Section 27A(b) is a measure that, far from upsetting the expectations of the complaining party, affirmatively serves the very fairness interest in preserving expectations for which due process provides protection. *Cf. Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 113 S. Ct. 2085, 2089 (1993) (noting "difficult[y]" of *Lampf* issue and describing Section 27A, with no hint of disapproval).

B. Because Section 27A(b) so plainly meets the governing due process standard, and indeed impairs no legitimately settled expectations at all, petitioners' argument is, as it must be, that the due process clause re-

quires a special rule treating final judgments as sacrosanct. But this Court's decisions setting forth the modern standard for retroactive legislation, as quoted above, give no hint that judgment-based rights are outside the standard, let alone accorded the absolute protection without which petitioners' challenge to Section 27A(b) must fail. And neither precedent nor policy can justify petitioners' claim that this Court should now adopt a special constitutional standard, indeed an absolute one forbidding any legislative impairment of final judgments.

1. To begin with, precedent will not support petitioners' claim. As they acknowledge (Pet. Br. 40-41), this Court has on many occasions and for many reasons sustained laws upsetting final judgments. *See Fleming v. Rhodes*, 331 U.S. 100 (1947); *Hodges v. Snyder*, 261 U.S. 600 (1923); *Pennsylvania v. Wheeling & Belmont Bridge, supra*; *Paramino Lumber Co. v. Marshall, supra*; *Stephens v. Cherokee Nation, supra*; *Freeborn v. Smith, supra*; *Freeland v. Williams*, 131 U.S. 405 (1889); *Sampeyreac v. United States, supra*. These cases cannot be squared with petitioners' claim of categorical sanctity for judgment-based rights. Contrary to petitioners' suggestion (Pet. Br. 40), it is irrelevant, for *due process* purposes, that some of the cases, including some involving monetary claims, involved the judgments of territorial or administrative rather than Article III tribunals. Similarly, the fact that some of the reopened decisions were rendered during national emergencies (Pet. Br. 40) is relevant only in that the circumstance supplies part of the rationale for the reopening: the cases remain as proof that judgments have not been treated as sacrosanct.

If the Court's precedent undermines the claim of *absolute* protection for judgment-based rights, it also undermines a lesser claim of *privileged* status for judgment-based rights compared with other "vested" rights (although such a claim would be insufficient to support petitioners' attack on Section 27A(b) in any event).

Petitioners themselves identify various decisions invalidating laws that impaired non-judgment-based property interests deemed "vested." *See* Pet. Br. 31-32, 35-36 (citing, *e.g., Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 340 (1922); *Stewart v. Keyes*, 295 U.S. 403 (1935); *Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913)).[19] Those cases, of course, date from an earlier era of substantive due process protection of property rights, an area now clearly governed by the rationality standard quoted above; but the statements petitioners cite about final judgments likewise come from an earlier era. *See* Pet. Br. 29-31 (quoting decisions from 1856, 1870, 1898, and 1923). In any event, the critical lesson is that the precedents undermine any claim that judgment-based rights have been afforded categorically greater protection than property rights not based on judgments. Indeed, this Court specifically said in *Fleming v. Rhodes*, 331 U.S. at 107, that "rights acquired by judgments have no different standing" for due process purposes than other "vested" rights, such as those gained by contract. *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citing *Fleming*, which involved a statute upsetting otherwise-final judgments, in setting forth current rationality test for retroactive legislation).

Against this background of case law (sometimes allowing disturbance of final judgments, while sometimes invalidating disturbance of other "vested" rights), it is hardly surprising that petitioners can identify no case in which this Court has *held* a statute invalid based on a distinctively absolute protection for judgments. Almost none of the flurry of Supreme Court decisions cited by petitioners even *says* anything about the protection of

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[19] Contrary to petitioners' suggestion, *Forbes* did not involve a "final" judgment (any more than did *149 Madison Ave. Corp.*, supra).

judgments as such at all.[20] Among those which do, *Pennsylvania v. Wheeling & Belmont Bridge*, *The Clinton Bridge*, and *Hodges v. Snyder* (all quoted by petitioners, *see* Pet. Br. 29-30, 31) each *upheld* laws that disturbed final judgments.[21] In the end, therefore, petitioners must rely almost exclusively on a passage from *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898). But that passage apparently is *dictum*, does not mention "due process" or actually rule on the constitutional validity of any statute allegedly disturbing a final judgment, and involves a statute enacted while a case was pending. Pet. Br. 30.[22] The broad statement from *McCullough*, which

[20] Notably, *Stewart v. Keyes*, *supra*, which petitioners quote at some length (Pet. Br. 32), involved protection of title to land, not protection of a judgment as such.

[21] *Hurtado v. California*, 110 U.S. 516 (1884), which petitioners also cite (Pet. Br. 30), merely held that the Fourteenth Amendment does not require States to use grand juries to lodge criminal charges.

[22] In *McCullough*, the Virginia Supreme Court ordered that judgment be entered against a bondholder suing to confirm his right to pay taxes with bond coupons. This Court concluded that the judgment had to be reversed because Virginia, in enacting a statute denying the tax-payment right granted upon the State's issuance of the bonds, had violated the Contract Clause. Virginia's final argument to avoid reversal was that, *while* the case was *pending* in the Virginia Supreme Court, the plaintiff's statutory cause of action had been repealed. This Court rejected that effort to avoid judgment on the Contract Clause challenge to the bond-impairing statute.

The Court first ruled that the state court had not in fact decided that the cause-of-action-repealing statute had any effect of abating the plaintiff's suit (a matter of state law) and, indeed, had taken action inconsistent with any such conclusion. Only then, having already given a sufficient reason for rejecting Virginia's argument, did the Court declare, in what was accordingly *dictum*, that the legislature could not "take away rights which have been once vested by a judgment." 172 U.S. at 123. Even that statement cited no authority or constitutional source, however, and ultimately led only to the conclusion that the repealing statute did not in fact affect the plaintiff's suit (again, apparently as a matter of inferred

is inconsistent with actual holdings and later doctrinal developments, is far from enough to support the special constitutional rule, as an exception to the generally applicable standard governing retroactive legislation, that petitioners ask this Court now to establish.

2. Petitioners offer no better reasons than they do precedent to support their claims of absolute, or even privileged, protection for judgments. A judgment, of course, may have the effect of creating a settled expectation that warrants protection under due process standards.[23] But it is the existence and magnitude of the protected interest, not whether the interest derives from a judgment, a contract, a property transfer, or some other source, that matters for due process purposes. There is no justification for a rigid distinction between judgments and other sources of protected interests that would give the former automatically privileged, or sacrosanct, status.

Absolute sanctity for judgments would, indeed, be inconsistent with Rule 60(b), Fed. R. Civ. P., which grants "authority adequate to enable [courts] to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (internal quotation marks omitted). As petitioners acknowledge, that authority has been used to reopen judgments for a variety of reasons, including changes in governing law. Pet. Br.

legislative intent). Of course, since the statute was enacted while an appeal was pending in the normal sense involved in *The Schooner Peggy*—and petitioners' citations offer no support for their assertion that an appeal in Virginia is different from an appeal elsewhere (Pet. Br. 30 n.34)—the statement in *McCullough* was concededly wrong in the context where it was made.

[23] A judgment may, under the relevant law defining property rights, also give a litigant title to certain real or personal property and, in that event, give rise to a right under the Takings Clause that otherwise might not exist. But the Takings Clause is not at issue in this case, which does not involve any title to identified property.

48 n.53; *see* Pet. App. A21; *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); *McGrath v. Potash*, 199 F.2d 166, 167 (D.C. Cir. 1952); *cf. Polites v. United States*, 364 U.S. 426, 433 (1960) (reserving question). Such limitations on the finality of judgments, enabling litigants to obtain relief outside the normal course of appeals, have a long history. *See* 7 J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 60.09 *et seq.* (2d ed. 1993).[24] Whatever the precise scope of Rule 60(b), petitioners can hardly claim an absolute constitutional protection for their judgment when even the non-constitutional protections of finality, present and past, stop considerably short of according rigid finality to judgments outside the avenue of direct review.

Even granting a privileged, though less than absolute, status to judgments—which would not be enough to strike down Section 27A(b) and which petitioners never seek to define—could not be justified in terms of the relevant interest protected by substantive due process: the

[24] In particular, it is clear that under the former federal scheme providing for district courts to sit for specified "terms," the dismissal judgment in this very case would have been open to revision when Congress enacted Section 27A(b), because a district court had plenary authority to alter its judgments during the same term. *See* 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.04, at 60-31 (2d ed. 1993); 7 *id.* ¶ 60.09, at 60-65; *Hill v. Hawes*, 320 U.S. 520, 524 (1944) (district court, during term, could take "such action as was in the interest of justice to a party to the cause"). In the Northern District of Texas (Dallas division), the term that began on the first Monday in May lasted until the next term began on the second Monday in January. *See* 28 U.S.C. § 189 (1940 ed.); 28 U.S.C. § 139 (1952 ed.); *Harlan v. McGourin*, 218 U.S. 442 (1910); *United States v. Perlstein*, 39 F. Supp. 965 (D.N.J. 1941), *aff'd*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942). Under that system, the dismissal order in this case (entered in September) would still have been subject to revision when Congress changed the relevant limitations period in December of the same year.

interest in leaving settled expectations undisturbed. *See General Motors v. Romein*, 112 S. Ct. at 1112. Petitioners can point to no sound basis for concluding, with support sufficient to undergird a distinctive constitutional rule, that final judgments categorically and uniformly generate stronger settled expectations than other kinds of rights, such as contractual or property rights. This case is a good example: petitioners' expectation that their dismissal would permanently bar Pacific Mutual's 10b-5 claims cannot have been very firm or definite (compared, *e.g.*, to a bond purchaser or an occupant of land with longstanding title): petitioners obviously knew that they had received a windfall from an unexpected change of law[25]; and congressional efforts to respond to the concededly unexpected effects of *Lampf* were under way even before this case was dismissed.[26] More broadly, petitioners have not, and likely could not, make any showing that nonconstitutional sources of law generally accord property rights derived from judgments privileged legal status over other sorts of property rights.[27]

[25] Petitioners do not assert the contrary in their brief. Pet. Br. 47-48. Nor could they, since they did not include a timeliness argument in the motion to dismiss that they filed before *Lampf*; only after *Lampf* did they raise a limitations defense. *See* page 2, *supra*.

[26] *See* Pet. Br. 4 n.2; 137 Cong. Rec. S10,691 (daily ed. July 23, 1991) (remarks of Sen. Bryan) (introducing S. 1533, which, among other things, permitted "the prompt refiling of any case dismissed based on Lampf"); 137 Cong. Rec. E2,843 (daily ed. Aug. 2, 1991) (remarks of Rep. Markey) (introducing H.R. 3185, which likewise permitted refiling). *See also* note 3, *supra*; *United States v. Darusmont*, 449 U.S. 292, 295-98 (1981) (retroactive taxes often upheld for period of legislative process).

[27] For example, judicial liens do not have any general priority over liens arising from contracts. *See, e.g.*, D. Epstein, J. Landers, & S. Nickles, *Debtors and Creditors* 9, 48, 346 (3d ed. 1987); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). Similarly, under 11 U.S.C. § 506, the central provision of the Bankruptcy Code concerned with liens, there is generally "no distinction between consensual and nonconsensual liens." *Ron Pair*, 489 U.S. at

Finally, a categorical protection for judgments would produce not just arbitrary but perverse results: such a rule would punish the diligent and responsible. It would punish the diligent, because individuals who pressed their rights through suit but then lost, even on an unexpected basis resulting from a change of law, would be worse off than individuals who never sued at all.[28] It would punish the responsible, because individuals who decided not to appeal when no grounds existed at the time would be worse off than individuals who pursued an appeal (and then a certiorari petition) solely for the purpose of keeping the case alive so that new legislation could be applied under the rule of *Schooner Peggy*—as Pacific Mutual could have done here.[29] The Constitution should not preclude Congress from deciding that fairness warrants treating similarly situated people similarly, rather than disfavoring those who most actively promoted their rights

242 n.5. Prior to the current Code, bankruptcy law often gave *less* protection to judgment-based liens than to consensual liens. *Id.* at 246-48; *id.* at 253-54 (O'Connor, J., dissenting). At least one provision of the current Code likewise gives less protection to judgment-based liens than to consensual liens. 11 U.S.C. § 522(f); *see Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991).

[28] The Oregon Supreme Court made this point in construing a retroactive law in a case similar to the present one: "It is unlikely that [the legislature] would have wanted to open the door to previously injured workmen for whom the time for filing had elapsed under the prior law but who had never filed a claim, and yet not wanted to open the door to claimant, who had at least been diligent enough to file a claim, albeit too late." *State ex rel. Huntington Rubber Mills v. Sulmonetti*, 557 P.2d at 643.

[29] The judgment of dismissal in this case was entered in early September 1991. The filing of an appeal (and, if necessary, a certiorari petition) would readily have kept the case alive until December 19, 1991, when Congress enacted Section 27A. Indeed, not even counting the time for the Fifth Circuit to act on any such appeal, the total of 30 days allowed for the notice of appeal (Fed. R. App. P. 4) and 90 days allowed for a certiorari petition (28 U.S.C. § 2101(c); S. Ct. R. 13.1) would have been enough for the case to be still pending when Section 27A took effect.

or refrained from filing appeals solely for delay's sake. That fair and sensible course of action should not be foreclosed by according magical significance to a judgment that has become final through the exhaustion of opportunities for direct appeal.

C. Even if this Court were to conclude that *some* types of judgments warrant special, or even absolute, due process protection, the particular type of judgment at issue here is the very last sort that deserves special protection against legislation like Section 27A(b). For one thing, the affected judgments, aside from being quite recent, neither confirmed title to some specific property nor even awarded money, but instead had only one concrete effect: to give the defendants a future protection against having to answer securities-fraud charges under 10b-5. And the statute did no more than to enable the plaintiffs to obtain a just adjudication of those charges.

In this respect, the validity of Section 27A(b) follows *a fortiori* from *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). There, the Court upheld a statute that directed the reopening of a specific damages dispute between private parties after an adjudication (by an administrative tribunal) that was by law deemed "final" when no judicial review was sought (33 U.S.C. § 921), that this Court subsequently cited as a final judgment (*Fleming v. Rhodes*, 331 U.S. at 107 n.12), and that had the preclusive effect of a final judgment (*see University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)). If the judgment-based expectations of repose could be unsettled in *Paramino* to make possible a fair adjudication of claims, the judgments affected by Section 27A(b) can surely be reopened as well.

The effect of Section 27A(b), moreover, is not even to require redetermination of a specific issue previously decided by the courts. The affected judgments rest on the determination of precisely one issue, and new legislation has changed the governing law on that issue to

make the prior determination immaterial. Thus, in substance Section 27A(b) does no more than provide the affected 10b-5 plaintiffs with a new claim—for securities fraud with a new limitations period.[30] And that claim would not appear to be precluded by the prior dismissal even under ordinary preclusion principles, at least not clearly so.[31] In these circumstances, it is wholly implausible to attribute such finality to the earlier judgment as to claim a *constitutional* right to immunity from having to answer the altered claim, which in its current form was not, and could not have been, litigated in the original action. *Cf. Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time").

Finally, and of course most concretely, the sole issue on which the judgment rests is a statute of limitations—one, in fact, that indisputably came as a surprise to all of the parties here. This Court has often noted the distinctively weak character of rights assertedly "vested" as a result of a procedural or administrative defect, including timeliness bars. *See, e.g., Paramino Lumber Co.*, 309 U.S. at 378; *Graham v. Goodcell*, 282 U.S. 409, 427, 429-30 (1931). The reasons are simple. Disturbing a "repose" that rests on limitations grounds does not make unlawful any conduct that was lawful at the time or otherwise alter underlying legal entitlements or duties. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (classically retroactive law "alter[s] the *past* legal consequences of *past* actions").[32] For example, petitioners' conduct either constituted securities fraud violating 10b-5 or not, regardless of whether Pacific Mutual's subsequent lawsuit was timely under *Lampf*. And as the Court observed in *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945), it is implausible to suggest that the affected defendants' "conduct would have been different if the present rule had been known and the change [made by Section 27A(b)] foreseen."[33]

Because statutes of limitations "represent expedients, rather than principles" (*Chase*, 325 U.S. at 314), "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Id.* at 316.[34] There is simply no good reason for

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[30] To the extent that Rule 41, Fed. R. Civ. P., treats a statute of limitations as part of the "merits," as petitioners note (Pet. Br. 46), that treatment makes it all the more appropriate to characterize Pacific Mutual's 10b-5 claim as a new claim after the enactment of Section 27A(b).

[31] The "new" 10b-5 claim would not be subject to issue preclusion because the only issue decided in the judgments of dismissal—the application of the *Lampf* limitations period—is no longer part of the claim. And claim preclusion would be inconsistent with the principle that a judgment in a case does not preclude claims that could not have been brought in that case: plaintiffs could not have brought their new claim, with its new statute of limitations, before December 1991. *See* Restatement (Second) of Judgments § 20 Comment k, § 24 & Comment f, § 26(f) & Comment i (1982).

[32] Historically, statutes of limitations have been treated as "procedural" for choice-of-law and other purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955); Restatement (Second) of Conflict of Laws §§ 142, 143 (1971). One consequence has been that there is no guarantee of freedom from having to answer the substance of a claim, or freedom from liability, based on a dismissal for untimeliness of the suit, because the same claim might be permitted in another jurisdiction. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[6], at III-162 (2d ed. 1993); Restatement (Second) of Conflict of Laws §§ 142, 143; Restatement (Second) of Judgments § 19 Comment f.

See also Block v. North Dakota, 461 U.S. 273, 291-92 (1983) (limitations bar does not determine underlying title to real property).

[33] That is so not only because conduct cannot be presumed to be determined by limitations periods, particularly those unexpectedly shortened by judicial decision after suit is filed, but also because other claims—here, Pacific Mutual's common-law fraud claims—may survive under a longer limitations period.

[34] The Court in *Campbell v. Holt*, 115 U.S. at 628, specifically rejected the notion that "a right to defeat a just debt by the

a different conclusion for those plaintiffs who had the lapse of time adjudicated against them before the legislature lengthened the period. There is still less reason for a different result where, as here, the superceded claim-barring limitations rule was itself the result of an unexpected judicial decision and the curative statute merely restored all parties to their original expectations. Section 27A(b), as such a statute, should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD G. TARANTO
(Counsel of Record)
H. BARTOW FARR, III
FARR, SMITH & TARANTO
2445 M Street, NW
Washington, DC 20037
(202) 775-0184

STEWART M. WELTMAN
STEWART M. WELTMAN &
ASSOCIATES, P.C.
135 S. LaSalle Street
Chicago, IL 60603

Dated: March 28, 1994

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statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. . . . No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost." *See also Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (following *Chase*).

FOR ARGUMENT

(8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

William R. Norfolk
Theodore Edelman
Timothy J. Helwick
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

Fletcher L. Yarbrough
CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Goldman, Sachs & Co.

Robert G. Cohen
Kathyrn A. Oberly
ERNST & YOUNG
380 Madison Avenue
New York, New York 10153

Morton L. Susman
WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Ernst & Young

JAMES W.B. BENKARD*
James D. Liss
Vincent T. Chang
David Rosenfeld
Arthur J. Burke
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HANNAH BERKOWITZ
New York, New York 10019

James L. Truitt
HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Morgan Stanley & Co. Incorporated

Robert B. Mazur
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171

Ernest E. Figari, Jr.
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Salomon Brothers Inc

* Counsel of Record
April 19, 1994

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IN THE

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MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

In its zeal to undermine two decisions of this Court, Congress has enacted a statute that reopens final judgments of Art. III courts in closed cases. This action poses a bold and serious threat to the constitutional foundation of judicial Power. Neither Pacific Mutual Life Ins. Co. ("PMLI") nor the Government can point to a single instance where a court has upheld such a law — because no such authority exists. This statute truly is the embodiment of Thomas Jefferson's "wolf" — brazen, undisguised, and ready to enter the fold.[1]

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1 In his *Notes on the State of Virginia*, Query 13, 121 (1784), Jefferson likened "unlimited powers" of the "assembly" to a wolf stalking the fold.

I. SECTION 27A(b) VIOLATES THE SEPARATION OF POWERS DOCTRINE.

A. As the Government and PMLI ("Respondents") have few, if any, decisions which even remotely support their positions, their briefs consist primarily of attempts to distinguish the authorities that Petitioners cite.[2] In particular, Respondents warp and shrink the rule of *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), limiting its holding to prohibit only the courts' acceptance of jurisdiction over disputes that are subject to pre-judgment, not post-judgment, statutes that permit the Congress to sit as a full-fledged "court of errors." But *Hayburn's Case* cannot be so limited. It holds that judgments of Art. III courts cannot "under any circumstances" be revised or suspended by non-Article III decisionmakers. *Id.* at 410 n.2. This principle applies regardless of whether the Executive or Congress actually sits as a "court of errors"; regardless of the outcome of their review; and regardless of whether their interference takes place pursuant to a pre-existing, or a post-judgment, statute.

1. In essence, the Government contends that § 27A(b) is a proper exercise of Congress' Art. I power because that statute purportedly leaves "[t]he ultimate judgment to be rendered . . . within the control of the judiciary" and makes no "case-specific determinations of the result of particular disputes." Gov. Br. 17; PMLI Br. 18; *see also* Gov. Br. 14, 17 n.12, 18, 27, 28.

But § 27A(b) is an exercise of "ultimate" power by Congress as to whether the courts' § 10(b) judgments will remain final: § 27A(b) specifically directs the vacation of duly rendered Art. III judgments and the reinstatement of claims dismissed in closed cases. Under *Hayburn's Case*, Congress

2 Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

cannot interfere with the judicial Power in this manner, any more than it can sit as a "court of errors."

A court's paramount function is to "judge": to provide litigants in particular, and society in general, with a forum for the certain, final end to disputes.[3] Section 27A(b) nullifies this "essential attribute[] of the judicial power," even if it dictates no results in particular cases. *See Northern Pipeline Constr. Co.*, 458 U.S. at 87 (opinion of Brennan, J.). *See also, e.g., Thomas* v. *Arn*, 474 U.S. 140, 154 (1985). Indeed, if the Government's position is accepted, the door is open for Congress repeatedly to vacate future judgments in any case previously closed by an Art. III court. Pet. Br. 23 & n.26.

In any event, *Hayburn's Case* forbids "suspension" or "control" of Art. III judgments, regardless of whether the "ultimate" outcome of particular cases is changed. Pet. Br. 16. "The fact that Congress did not dictate . . . a particular result . . . does not in any way negate the fact it has sought to exercise judicial power." *United States* v. *Sioux Nation*, 448 U.S. 371, 430 (1980) (Rehnquist, J., dissenting). Indeed PMLI itself notes that the principle in *Hayburn's Case* may be violated even if

3 *See* Gov. Br. 12 (judicial power "contemplates the power to render final judgments that are conclusive"); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (opinion of Brennan, J.) (power to issue "final determination . . . must remain with the judge") (citation omitted); *Commodities Futures Trading Comm.* v. *Schor*, 478 U.S. 833, 853 (1984) (same); Pet. Br. 14 & n.18, 23 & n.25. *See also* 2 Story, *Commentaries on the Constitution of the United States* 422-33, 463 (3d ed. 1858) (judgments "must be conclusive" so that Congress and the Executive do not "enjoy a secure and irresistible triumph"); Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J. Law & Pub. Policy 23, 30 (1994) (judicial power requires "binding judgments that are not subject to collateral challenge"); Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 312 & n.108, 322-23 & n.139 (1992) (Marshall and 1802 Congress viewed finality as "indispensable" to judicial power).

"the judicial determination" would be "simply ratified" by the "executive or legislative authorities." PMLI Br. 15.[4]

Nor is it relevant that, after overturning the final judgments in question, § 27A(b) may leave with the courts the "ultimate" decision, assuming that Congress does not change the law again. The breach of separation of powers occurs when the judgment is suspended, regardless of what happens later. And § 27A(b) mandates that the courts in the reopened § 10(b) cases disregard this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Pettigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991) and *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991) — an unconstitutional restriction upon the courts' purportedly "ultimate power" upon "remand" from the Congress.[5]

2. The Government also contends, based solely on *Sioux Nation*, 448 U.S. at 371, that § 27A(b) is "no different in effect" than the enactment of a hypothetical § 10(b) statute, with an extended statute of limitations, which — the argument assumes — would be constitutional. Gov. Br. 18-20. But, regardless of its hypothetical validity, the statute the Government posits was *not* enacted. And, unlike the hypothetical legislation, § 27A(b) applies only retroactively to dismissed and closed cases. Pet. Br. 26-27; p. 8, *infra*. In any event, even if the hypothetical legislation were permissible, it does not

4. The statute in *Hayburn's Case* raised only the possibility that non-Art. III decisionmakers would revise final judgments. *See* 2 U.S. at 410 n.2; Pet. Br. 17.

5. *See Northern Pipeline Co.*, 458 U.S. at 81-83 (district court's ultimate power of review of decisions of non-Art. III tribunal insufficient because it was restricted by "clearly erroneous" standard of deference); Pet. Br. 23 & n.25. *See also Chadha* v. *INS*, 634 F.2d 408, 430 (9th Cir. 1980) (Kennedy, J.) ("supervening legislative action" that could create a "de facto revision of the Court's statutory interpretation" violates *Hayburn's Case*), *aff'd on other grounds*, 462 U.S. 919 (1983).

follow that § 27A(b) would be. "Plenary power for making laws does not import authority to revise particular administrative dispositions ... the greater power definitely does not include the lesser," because the lesser disrupts the judicial Power. *See Chadha*, 634 F.2d at 434 (Kennedy, J.); Pet. Br. 25-27.

Insofar as it attempts to override *res judicata*, the "new" § 10(b) statute hypothesized by the Government would raise serious constitutional problems.[6] Moreover, simply as a matter of statutory construction, the hypothetical statute would not be construed as reopening final judgments unless the legislation expressly so specifies. *See* Amicus Br. of Spendthrift Farm 26-27.[7] Thus, to reopen final judgments, the hypothetical

6. Even the retroactive application of court decisions is "limited by the need for finality ...; once suit is barred by res judicata or by statutes of limitations or repose, a new rule cannot open the door already closed." *Beam*, 111 S. Ct. at 2446 (opinion of Souter, J.). Thus, *res judicata* must be of constitutional dimension; otherwise it could not restrict the retroactive application of court decisions, which is required by "basic norms of constitutional adjudication." *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2516 (1993) (citation omitted).

7. Similarly, even if *res judicata* is not constitutionally based, new legislation of general applicability would not overcome *res judicata*; to do so such a statute would need to mandate specifically the nullification of final judgments. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 854 n.2 (1990) (Scalia, J., concurring) (finally adjudicated cases are "placed beyond the reach of the new statute by the doctine of *res judicata*"); *Aunyx Corp.* v. *Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1992 (different sources of law do not defeat *res judicata*), *cert. denied*, 113 S. Ct. 1416 (1993). *See* Pet. Reply Br. In Support of Pet. for Cert. at 3 n.5; *see also* p. 19, *infra*. PMLI responds that *res judicata* does not apply to claims based upon new statutes because such claims could not have been brought at the outset. PMLI Br. 30 & n.31. This Court has implicitly rejected that contention. *See Nevada* v. *United States*, 463 U.S. 110, 119, 130 (1983) (applying *res judicata* because of factual overlap between claims despite new substantive standard in supervening executive order); 1B *Moore's Fed. Practice* ¶0.410[1] (1993) (construing *United States* v. *Southern Ute Tribe*, 402 U.S. 159 (1971), as holding that judgment under one treaty barred second suit involving same land that relied on subsequent treaty). PMLI is also incorrect in suggesting (PMLI Br. 30-31 & n.32) that a judgment on limitations grounds is not "on the merits." *See* Pet. Br. 46; p. 18, *infra*.

legislation would have to do precisely what *Hayburn's Case* forbids: specify particular judgments for legislative reversal, as § 27A(b) does. Affixing the label "new cause of action" to such legislation cannot save it.[8]

Aside from these dispositive flaws in the hypothetical statute, the notion that the Congress can undo a judgment it does not like by creating a new claim is breathtaking in its audacity and ominous in its implications. The logical chain has no end: affirmative defenses could be added or subtracted; burdens of proof could be altered; and even damages could be halved, doubled, or trebled. Such manipulation would gravely weaken the institutional integrity of the judiciary as a co-equal branch.[9]

3. The Government cites only *Sioux Nation* to support this remarkable concept. But the "legislation" in *Sioux Nation* was merely the embodiment of Congress' decision to waive its *res judicata* defense. Congress was "to all intents and purposes the defendant[]." *Sioux Nation*, 448 U.S. at 398 (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1867)). Unlike legislation reversing a final judgment, a defendant's waiver of *res judicata* merely forswears the affirmative use of a judgment and in no way challenges the validity of the prior judgment. *See Sioux Nation*, 448 U.S. at 401 (citing *Pope* v. *United States*, 323 U.S. 1, 9-10 (1944) for the proposition that acceptance of moral obligation does not undermine court's finding that no legal

8. The Framers specifically condemned intrusions on the judicial Power that take the form of new legislation. Pet. Br. 25 n.28. Indeed, in *Hayburn's Case*, the statute was unconstitutional even though the Government could have used the same argument that the Government uses here: that the pension legislation was constitutional because the Congress could have passed a hypothetical statute embodying new pension standards.

9. This is especially so because § 27A(b) vacates judgments and directs the courts to ignore this Court's mandate in *Beam* that *Lampf* be retroactively applied. *See Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 113 (1948) (Congress and the Executive may not "disregard the judgment of the court").

obligation exists); *id.* at 431 (Rehnquist, J., dissenting); *see Schor*, 478 U.S. at 855 (non-Art. III dispute resolution by "willing parties" does not undermine judicial Power). Thus, the courts uniformly interpret *Sioux Nation* as permitting nothing more than the government's waiver of the benefit of an affirmative defense of *res judicata* based on a prior judgment. Pet. Br. 24-25.

Nonetheless, without any supporting authority, Respondents assert that *Sioux Nation* cannot be so distinguished because if final judgments are protected by Art. III, those structural considerations "would not be subject to waiver by *any* party litigant." Gov. Br. 19-20 & n.15; PMLI Br. 18 n.15. But, unlike the legislative nullification of final judgments or of the *res judicata* effect of those judgments, the government's payment of its debts carries no separation of powers implications and, thus, requires no waiver of that doctrine. *See* p.6, *supra*. In any event, structural separation of powers arguments are waivable if, as in *Sioux Nation*, they do "not call into question the jurisdiction of the forum . . . that issued the judgment." *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2647-48, 2649 (1991) (Scalia, J., concurring).[10]

B. PMLI contends that *Hayburn's Case* is based only on the prohibition against advisory opinions and, therefore, legislative reversal of a court decision is not itself unconstitutional. According to PMLI, *Hayburn's Case* only forbids the court's assumption of jurisdiction over a claim that, at the outset, is subject to later extrajudicial review. PMLI Br. 13. According to PMLI, as §27A(b) was enacted after the judgment at issue in this case, *Hayburn's Case* does not apply because the lower

10. *See also Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 238-39 (1833) (cited in Gov. Br. 14 & n.9) (upholding overturning of state court judgment found to be void because it was in favor of a fictitious person, but stating that if Sampreyreac "was a real person, and appeared here, setting up this objection, it might present a different question").

court had a "live case or controversy" at the time the judgment was entered. Apparently, it matters not that § 27A(b) was later passed and voided the judgment, so long as the court had the privilege, at some point, of rendering what it thought was a final decision. No authority supports this point (*see* Pet. Br. 23, 25-27); numerous decisions construe *Hayburn's Case* as fully applicable to legislation enacted *after* the entry of a final judgment (*see* Pet. Br. 19 & n.23, 26 & n.29); and the theory leads to results that can only be described as absurd.

To begin with, a post-judgment statute, such as § 27A(b), is just as destructive of a court's right to decide cases or controversies as a pre-existing law. The former merely works its mischief after the fact, thereby wasting the time of the court and the litigants, as well as violating the Constitution. As a constitutional matter, Congress can no more create a case and controversy out of claims that have been finally dismissed in accordance with this Court's rulings than it can sit as a "court of errors." Thus, contrary to PMLI's position (Br. at 16), an act of interference taken by another branch of the government *after* final judgment also renders the prior judgment advisory, in violation of the case and controversy requirement. *See Town of Deerfield* v. *FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993).

PMLI's position also fails because it would produce the anamolous result of invalidating legislation directed to future judgments, which creates only the "potential" for non-Art. III revision at the time of judgment (PMLI Br. 14), while upholding legislation such as § 27A(b) that *actually* revises past Art. III judgments. *See Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993). Such an outcome cannot be reconciled with the proper function of a legislature — to "look to the future." Pet. Br. 27 & n.30; *see Harper*, 113 S. Ct. at 2523 (Scalia, J., concurring) (legislation is prospective and adjudication retrospective).

More fundamentally, while some applications of *Hayburn's Case* turn on the prohibition against advisory opinions, *see* Gov. Br. 26, PMLI Br. 15,[11] that fact does not undercut the central underpinning of *Hayburn's Case*: the need to safeguard the "judicial Power" of Art. III courts. *See* Pet. Br. 16 n.21 (citing Nowak & Rotunda and Corwin); Amar, *On Lawson On Precedent*, 17 Harv. J. Law & Pub. Policy 39, 42 (1994). Indeed, the "judicial Power" of Art. III resides principally in the power to issue "judgments." If Congress may revise or ignore Art. III judgments — in the words of Justice Jackson, refuse judgments "full faith and credit," *Chicago & Southern Air Lines*, 333 U.S. at 113, — then the "judicial Power" of Art. III is compromised, if not eviscerated. Thus, *Hayburn's Case* forbids *any* revision or control of final judgments by non-Art. III decisionmakers "in whom no judicial power of any kind appears to be vested." 2 U.S. (2 Dall.) at 413 n.2.[12]

Accordingly, PMLI errs in asserting that the legislature may revise final judgments at will and that *Hayburn's Case* only forbids the courts from assuming jurisdiction over a case that at the outset is subject to such revision. PMLI Br. 13. Instead, this Court has condemned not only the unconstitutional assumption of jurisdiction, but also post-judgment attempts to "revise" or

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11 The fact that some of these cases involve the decisions of non-Art. III tribunals is irrelevant. The critical point is that extra-judicial review is inconsistent with the judicial Power. Thus, *Chicago & Southern Air Lines* held federal court review of an agency decision unconstitutional because the court's decision would, in turn, be subject to executive review. 333 U.S. at 112-14.

12 The First Congress also believed that the law in *Hayburn's Case* had been found unconstitutional because it "render[ed] the Judiciary subject to the Legislative and Executive powers, which ... ought to be kept carefully distinct." Annals of Cong. 556-57 (J. Gales ed. 1792) (quoted in Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 593 n.104 (1989)). These views of the First Congress are accorded deference. *See Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986).

"overturn" judgments even if there was no preexisting "provision for executive or legislative revision at all." Gov. Br. 27 & n.22. *See United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934); *United States* v. *Waters*, 133 U.S. 208, 213 (1890).[13] *See also* Pet. Br. 19 n.23, 26 n.29 (citing numerous lower court decisions discussing *Hayburn's Case* in the context of legislation enacted after the entry of final judgment).

C. While the Government asserts that the historical record "stands for a good deal less than petitioners claim," it focuses only on a small fraction of the sources cited in the briefs of petitioners and amicus Spendthrift Farm, and in *Plaut*, 1 F.3d at 1487. Gov. Br. 22-23. The Government dwells on the Pinckney Plan, Gov. Br. 21-22, but does not deny that the Constitutional Convention rejected several other proposals that would have permitted the legislature to have control over the courts or the judicial Power. Pet. Br. 14-15 n.19; Amicus Br. of Spendthrift Farm 11 n.3. And the Framers rejected Revolutionary War practices that resulted in the reopening or suspension of judicial decisions in a manner analogous to § 27A(b). *See* Amicus Br. of Spendthrift Farm 9-10 (citing Corwin).

The Government seeks to diminish the force of Alexander Hamilton's criticism of legislative interference in judicial affairs by pointing to his observation that the Constitution does not explicitly ban such interference. But Hamilton merely noted the absence of a textual prohibition in the Constitution; he certainly did not imply that Congress had the right to usurp judicial Power. To the contrary, Hamilton wrote that legislative review of court decisions "exceed[s]" the legislative "province" and is not "authorize[d]" by "[t]he theory" of the United States, British, or state constitutions, *Federalist No. 81*, at 545 (J. Cooke ed. 1961)—obviously a viewpoint which

13. Despite PMLI's suggestion (Br. at 13 n.9), *O'Grady* and *Waters* are based on the Constitution, not statutory interpretation. *See O'Grady*, 89 U.S (22 Wall.) at 646; *Waters*, 133 U.S. at 213.

qualifies as "legislative history" of the highest order.[14]

D. Notwithstanding the Government's contention (Gov. Br. 24-25), Fed. R. Civ. P. 60(b)(6) and 28 U.S.C. § 1655 merely codify the historic power of the courts to reopen their own judgments in extraordinary circumstances — a power obviously different from § 27A(b). Neither R. 60(b)(6) nor § 1655 subjects the decisions of a court to extra-judicial review. Indeed, R. 60(b)(6) does not mandate anything; it merely permits the courts, in their discretion, to exercise their judicial Power to reopen judgments under narrowly circumscribed conditions, free from legislative interference. Pet. Br. 49.

Similarly, § 1655 merely defines when certain judgments involving lien enforcement become truly final, permitting the reopening of those decisions during a one-year period. In constitutional terms, this one-year waiting period is not conceptually different from other generally applicable prerequisites for finality, such as the 30-day waiting period during which a losing party is allowed to file an appeal with the Court of Appeals.

In any event, both R. 60(b) and § 1655 are "[r]ules regulating matters indisputably procedural" and are thus "*a priori* constitutional." *Burlington Northern R.R. Co.* v. *Woods*, 480 U.S. 1, 5 (1987). Such pre-existing procedural rules applying neutrally to all cases comport with the "long-recognized power of Congress to prescribe housekeeping rules for federal Courts." *See Hanna* v. *Plumer*, 380 U.S. 460, 473 (1965). But that principle has no bearing on § 27A(b), which is not a housekeeping rule, but is instead post-judgment legislation that alters the substantive outcome in particular cases.[15]

14. The "theory" of separation of powers is enforced even without a precise textual mandate. *See Bowsher* v. *Synar*, 478 U.S. 724, 725 (1986) (need for protection for separation of powers "implied in the very fact of the separation of the powers of these departments by the Constitution") (citation omitted).

15. Amicus NASCAT asserts that the avoidance of "inequitable results" justifies § 27A(b). NASCAT Amicus Br. 8-10. But the equitable argument of the pension beneficiary in *Hayburn's Case* was rejected. 2 U.S. (2 Dall.) at 410 n.2. In any event, such equitable arguments have no bearing on separation of powers. Pet. Br. 27-28.

II. SECTION 27A(b) VIOLATES THE FIFTH AMENDMENT.

A. While the point tends to get lost in the underbrush of the Respondents' rhetoric, the simple fact remains that an authoritative decision of this Court establishes that § 27A(b) violates the Constitution because "it is not within the power of the legislature to take away rights which have once vested by a judgment." *McCullough* v. *Virginia*, 172 U.S. 102, 123-24 (1898); *see Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923). Purely private rights, once finally adjudicated, "become[] absolute" and are "beyond the reach of Congress." *Pennsylvania* v. *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1856). Respondents brush *McCullough* aside as a relic, but point to no decision of this Court which contains the slightest criticism of *McCullough*; nor do they even attempt to respond to the dozens of Circuit and District Court decisions that applied the constitutional principle espoused by that decision. Pet. Br. 33, 39.[16]

1. Apart from contending that it is too old to be good law, Respondents' principal response to *McCullough* is the same as the Fifth Circuit's: that *McCullough* involved a statute enacted while an appeal was still pending. PMLI Br. 24-25 n.22. However, the decision in *McCullough* was final under Virginia law, Pet. Br. 30 n.34, a point which Respondents simply ignore.[17]

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16 Despite Respondents' position, *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), involved a final judgment of the Florida Supreme Court and, thus, reinforces petitioners' position. *See e.g., American Fed. of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989); *Canisius College* v. *United States*, 799 F.2d 18, 25 (2d Cir. 1986) ("Canisius, unlike the *Forbes* plaintiff, had no final judgment" or other "vested right"). Additionally, numerous state courts, including recent decisions, have recognized *McCullough* as determinative. *See, e.g., Messenger* v. *Messenger*, 827 P.2d 865 (Okla. 1992); *Kirk* v. *Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991) (en banc).

17 The determination of when due process protection attaches, *i.e.*, when a state judgment becomes final, is a matter of state law. *See Western Union Telegraph Co.* v. *Louisville & Nashville R.R. Co.*, 258 U.S. 13, 21-22 (1922) (looking to Kentucky law to determine whether rights had vested; due process protection did not attach until claim was adjudicated in "final and unreviewable determination").

2. *Stewart* v. *Keyes*, 295 U.S. 403 (1935), cannot be distinguished on the basis that it protects only title to land, not judgments. Gov. Br. 41 n.31; PMLI Br. 24 n.20. Due process protects intangible property. *See Tulsa Prof. Collection Servs.* v. *Pope*, 485 U.S. 478, 485 (1988). Moreover, *Stewart* involved a court-approved sale of property, constituting a final judgment that was not appealed and thus could not be vacated by a subsequent statute enlarging the prior limitations period. Pet. Br. at 32; *Stewart*, 295 U.S. at 407, 416-17. Despite the Government's contention (Br. 41 n.31), *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945), does not undermine *Stewart*. *Chase* involved a "pending" action and the decision plainly implied that the result would have been different had the legislation deprived the defendant "of a final judgment in its favor." Pet. Br. 45-46.

3. As did the Fifth Circuit, respondents rely heavily on *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). Gov. Br. 33-34; PMLI Br. 22-23, 29. Petitioners advanced several points distinguishing the case, which Respondents did not address. Pet. Br. 42-43. We would only point out, again, that, unlike the decree in this case which called for no further action by the court or the parties, in *Fleming* this Court upheld wartime legislation that blocked the enforcement of a *prospective* judgment of eviction, granted by a non-Art. III court, that had not been implemented by the landlords. Pet. Br. 42-43. *See Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958) (cited in Gov. Br. 34) (construing *Fleming* to uphold a statute that "applies prospectively only.").

4. The Government also relies on *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); and *Freeland* v. *Williams*, 131 U.S. 405 (1889). Government Br. 42-48; *see* PMLI Br. 29-30. All of these cases are readily distinguishable for reasons set forth in our main brief. *See* Pet. Br. 31, 40-44. In particular, while upholding the Congressional power to regulate legislative courts, *Stephens* restates the general rule that "it is undoubtedly true that legislatures cannot set aside the judgments of [Art. III] courts." 174 U.S. at 478. As the Government implicitly acknowledges (Gov. Br. 47), *Paramino Lumber* and *Stephens* also involve non-Art. III administrative decisions that created no

vested rights.[18]

Contrary to the Government's interpretation (Gov. Br. 47), the legislation in *Freeland* reopened a judgment that, despite its "prima facie" validity, created no vested rights because it was rendered "on account of acts done in pursuance of the powers of a belligerent in time of war." 131 U.S. at 417. Such a judgment was rendered "without authority of law" and was thus "voidable" by the legislature. *Id.* at 419, 420.[19] Apart from the Fifth Circuit decision below, *Freeland* has never been cited to nullify final judgments that fall outside of this limited context.

The Government also portrays § 27A(b) as serving the "same role" as the law in *Paramino Lumber*, which lifted a time bar so that a new rule of decision could be applied. Gov. Br. 45-46. But *Paramino Lumber* involved an administrative decision and relied in large measure on cases upholding legislation "to remedy mistakes in administration." *Paramino Lumber*, 309 U.S. at 378. Section 27A(b), in contrast, does not "cure" administrative "mistakes," but attempts impermissibly to overturn an "intervening right" — the final judgment of an Art. III court. Pet. Br. 41 n.43.

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18. *See* 2 Davis and Pierce, *Administrative Law Treatise* at § 13.3 (3d ed. 1994) (prior to *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966), courts had held *res judicata* inapplicable to administrative decisions because such decisions were often made informally without a hearing or other procedural protections).

19. Judgments granting reparations against the government for the taking of property in the Civil War were "a matter of bounty rather than of strict legal right," which could be rescinded whenever the government so desired. *United States* v. *Pacific R.R.*, 120 U.S. 227, 237 (1887). *Cf. Kent* v. *Dulles*, 357 U.S. 116, 128 (1958) (non-wartime controversy at issue could not be "equate[d] ... with problems that arise under the war power"). *Accord United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (if the nation "has given up vested rights" in times of "great national concern," it is "not for the court but for the government" to determine compensation).

5. Fed. R. Civ. P. 60(b)(6) does not justify PMLI's position. R. 60(b)(6) was a pre-existing condition of the final judgment, not a post-judgment collateral attack. *See* p. 11, *supra*. When rendered, a judgment is subject to R. 60(b)(6) and other rules governing the execution and effect of judgments, just as land may be acquired subject to easements and other limitations. Thus, the use of R. 60(b)(6) is no more a deprivation of property than the use of a pre-existing easement across another person's property would be a trespass. Because R. 60(b)(6) partially defines the property right at the outset, its subsequent implementation cannot effect a "diminishment" of that property.[20]

B. Relying primarily upon *Campbell* v. *Holt*, 115 U.S. 620 (1885), a decision that does not permit the elimination of final judgments, Respondents mount a sweeping attack on the entire concept of vested rights, urging that it is inconsistent with "modern" due process principles (Gov. Br. 30; PMLI Br. 19). The Government concedes that "numerous" recent decisions of the court do embody vested rights principles (Gov. Br. 30-32; Pet. Br. 33-37),[21] but asserts that most of these cases involve the takings clause, not due process. Gov. Br. 32 & n.26. However, the interests protected by the due process and taking clauses coalesce, so that takings cases defining the scope and protection accorded property rights also define the protection accorded by due process: "any significant taking of property by the State is within the purview of the Due Process Clause." *Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2115 (1991). *See also TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (forbidding " 'taking of ... property without

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20. Additionally, "the most relevant Supreme Court decisions suggest that courts," as opposed to legislatures, "are absolutely free to make such changes in property rights." *See* Thompson, *Judicial Takings*, 76 Virginia L. Rev. 1449, 1453 (1990); Pet. Br. 48-49.

21. *See also* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stanford L. Rev. 69, 76 (1982) (discussing the "long and unbroken tradition of viewing the legal universe in terms of a division between interests that are formally vested and interests that are merely inchoate legal wants.").

due process' '') (citation omitted); *Kaiser Alum. Corp.*, 494 U.S. at 856 (Scalia, J., concurring) (the Constitution ''prohibits (or requires compensation for) all retroactive laws that destroy vested rights''). Thus, if § 27A(b) ''takes'' a vested property right, it follows that due process would also forbid that deprivation in the absence of just compensation. *See* p. 17, *infra*.

1. Contrary to Respondents' position, Petitioners need not show that a judgment is entitled to ''privileged'' protection. Instead, Petitioners met the applicable burden of showing that a judgment is entitled to as much protection as any other vested property rights. Pet. Br. 36-37. Respondents respond that this particular judgment is not a vested property right because petitioners essentially ''received a windfall'' (PMLI Br. 27; Gov. Br. 37-38) which may be taken subject to only the ''rational relationship'' test that applies to a claim of due process protection for an *unadjudicated* cause of action.[22]

But adjudicated rights are different. The Congress may no more second-guess the basis of rights fixed by final judgment than Congress can upset rights vested by a deed, even if either property right results from a purported windfall. Pet. Br. 47-48. Like a lien or a deed, a judgment is a ''perfected claim'' that determines ''the legal relation of the litigants,'' Pet. Br. 36, and is accorded ''comprehensive protection.'' *Id.* And this is true regardless of how the vested right was obtained; a piece of land would be protected even if, for example, a landowner had won the land the day before in a lottery and thereby received a ''windfall.''[23] Similarly protected is property transferred

22 It is irrelevant that PMLI may have a state securities law claim even if the § 10(b) claim is not reinstated. Gov. Br. 29 n.25. The judgment endows petitioners with the tangible right to relief from exposure to § 10(b) claims, *see* Pet. Br. 46-47, and it does not matter that other contingent claims with different, and more onerous, requirements of proof remain. If, in fact, the freedom from liability for violation of § 10(b) is such an ephemeral right, we invite PMLI to explain why it appealed the District Court's order declining to reinstate that claim.

23 *See Carlton* v. *United States*, 972 F.2d 1051, 1060 (9th Cir. 1992) (due process violated by elimination of tax deduction, notwithstanding the Government's argument that taxpayer should have known that deduction was ''too good to be true''), *cert. granted*, 114 S. Ct. 55 (1993); *see also*

pursuant to a court order on which the limitations period for rescission has run, and a supervening statute may not lift that bar. *See Stewart*, 295 U.S. at 417. By this same analysis, the judgment here confers a ''vested'' property right not subject to retroactive legislative divestiture.

2. Respondents also cite *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), Gov. Br. 15, 31, 32, 36; PMLI Br. 20, 23, a case which concededly did not involve a final judgment. Pet. Br. 37-39. While *Usery* permits the retroactive overturning of unadjudicated expectations, such as a party's assumption and hope that it will be free from liability based on current law, that unvested expectation receives no constitutional protection. 428 U.S. at 16. Once it hardens into a final judgment, however, a bright line is drawn and the principle in *Usery* is inapplicable, as the lower courts recognize. Pet. Br. 38-39.[24]

The Government contends, without authority, that it may retroactively cancel property rights so long as it acts rationally. To the contrary, Congress may regulate, restrict, or condition vested property rights, but it cannot do what it did here: completely eliminate a vested property right. Pet. Br. 38. *Cf. Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 197 & n.15 (1985) (discussing possible due process implications of ''regulation [that] goes too far'') (citation omitted).[25]

Hodel v. *Irving*, 481 U.S. 704, 715 (1987) (act which abolished right to pass on property by descent or devise was unconstitutional, although it is ''dubious'' whether owners had investment-backed expectations or reliance interest in passing on property acquired by gift, descent, or devise).

24 Regardless of bankruptcy law on judicial liens (PMLI Br. 27-28 & n.27), a judicial lien is ''a significant property interest entitled to the protections of the due process clause.'' *Verba* v. *Ohio Cas. Ins. Co.*, 851 F.2d 811, 814 (6th Cir. 1988).

25 Contrary to the Government's position, *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981), shows that vested rights may not be divested subject to a showing of ''rationality.'' Additionally, despite the Government's interpretation (Gov. Br. 32 n.26), *Coombes* v. *Getz*, 285 U.S. 434, 448 (1932), precludes the retroactive divestiture of vested rights under the due process clause as well as the contract clause. Similarly, apart from statutory construction issues, *Asiatic Petroleum Co.* v. *Insular*

3. Without case authority, PMLI asserts that a judgment based on limitations grounds deserves less due process protection than other judgments because a limitations period is a matter of legislative "expedien[ce]." PMLI Br. 30-31. But while "Congress may change an established time bar . . . where the courts have *adjudged* a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment." *Plaut*, 1 F.3d at 1496. Thus, *Chase Sec. Corp.*, 325 U.S. at 310, 316, strongly suggests that judgments based on limitations grounds may not be legislatively nullified. Pet. Br. 45. Moreover, judgments based on limitations grounds are "substantive," for *res judicata* and due process purposes (Pet. Br. 45-48), regardless of the rule in the choice of law analysis. *Cf.* PMLI Br. 31 & n.32. And *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 427 (1931) (cited in PMLI Br. 30) permits correction of "defects in administration," not the divestiture of vested rights such as final judgments. Pet. Br. 41 & n.43; *see* p. 14, *supra*.

4. PMLI contends that § 27A(b) is tantamount to a new claim for securities fraud with a new limitations period — a contention that fails as a due process argument for the same reasons it fails as a separation of powers argument. *See* p. 4-6, *supra*. New laws of general applicability do not eliminate the *res judicata* effect of a final judgment. *See* p. 5 & nn.6-7, *supra*, & p. 19, *infra*. More fundamentally, *Hodges*, 261 U.S. at 603-04, *Forbes*, 258 U.S. at 340, *McCullough*, 172 U.S. at 123-24, and *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 430, all involved legislation that attempted to overturn final judgments.

Collector of Customs, 297 U.S. 666, 671 (1939), states that the statute could not "[i]n any event . . . operate retroactively to deprive the petitioners of rights vested before its adoption." And *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913) is not an anachronism because it found a due process right in a statutory cause of action. Gov. Br. 33. In fact, this Court has recently reaffirmed that "a cause of action is a species of property" protected by due process. *See Tulsa Prof. Collection Servs.*, 485 U.S. at 485 Thus, the principle of *Ettor* still stands: retroactive legislation may not "deprive one of a vested property right." 228 U.S. at 155.

Thus, merely calling a statute a "new claim" does not avoid the due process problem; a new claim may no more nullify a judgment than it may rescind a deed.

5. Finally, PMLI also contends that protecting final judgments would "perverse[ly]" punish "responsible" individuals who did not press an appeal "when no grounds existed at the time." PMLI Br. 28 Respondents also assert that the judgment that petitioners defend was a "windfall" in which petitioners have no "reliance" interest. PMLI Br. 28-31; Gov. Br. 36.

But far from being a "windfall," the judgment at issue directly resulted from this Court's decisions. Pet. Br. 47-48. Indeed, "basic norms of constitutional adjudication" in *Beam* require retroactive application of *Lampf*: the law may not "'shift and spring' according to 'the particular equities of [individual] parties' claims of actual reliance on an old rule and of harm from retroactive application of the new rule.'" *Harper*, 113 S. Ct. at 2517 (quoting *Beam*, 112 S. Ct. at 2447 (opinion of Souter, J.)). In particular, a party that makes a "'deliberate choice not to appeal'" receives no relief from judgment, despite intervening changes in law. *See Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 396, 400 (1981) (*res judicata* applies, despite change in Supreme Court precedent); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940) (bankruptcy plan not vacated even though Supreme Court had held bankruptcy law unconstitutional after plan confirmed). *See* p. 5 & nn.6-7, *supra*.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
April 19, 1994

Respectfully submitted,

William R. Norfolk
Theodore Edelman
Timothy J. Helwick
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

Fletcher L. Yarbrough
CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for
Goldman, Sachs & Co.

Robert G. Cohen
Kathyrn A. Oberly
ERNST & YOUNG
380 Madison Avenue
New York, New York 10153

Morton L. Susman
WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for
Ernst & Young

*Counsel of Record

JAMES W.B. BENKARD*
James D. Liss
Vincent T. Chang
David Rosenfeld
Arthur J. Burke
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HANNAH BERKOWITZ
New York, New York 10019

James L. Truitt
HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for
Morgan Stanley & Co. Incorporated

Robert B. Mazur
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171

Ernest E. Figari, Jr.
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for
Salomon Brothers Inc

Supreme Court, U.S.
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October Term, 1993

MORGAN STANLEY & CO. INCORPORATED; GOLDMAN, SACHS & CO.; ERNST & YOUNG; SALOMON BROTHERS INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

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BRIEF OF SPENDTHRIFT FARM, INC. AND BATEMAN EICHLER, HILL RICHARDS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BARBARA B. EDELMAN
BARRY FRIEDMAN*
G. CHRISTOPHER VAN BEVER
STEVEN L. SNYDER
WYATT, TARRANT & COMBS
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

Counsel for Amicus Curiae Spendthrift Farm, Inc.

**Counsel of Record*

February 1994

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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ELIZABETH S. FEAMSTER
FOWLER, MEASLE & BELL
300 W. Vine Street
Kincaid Towers
Suite 650
Lexington, Kentucky 40507
(606) 252-6731

JAMES E. BURNS, JR.
KEVIN P. MUCK
JOHN MISSING
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 442-0900

Counsel for Amicus Curiae
Kemper Securities, Inc.
(formerly Bateman Eichler,
Hill Richards, Inc.)

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INTEREST OF AMICI[1]

Amici are named defendants in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir.), *reh'g denied*, 11 F.3d 572 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11,

[1] Written consent to the filing of this *Amicus Curiae* brief has been obtained from all parties in this case and correspondence indicating that consent has been filed with the Court in accordance with Sup. Ct. R. 37.

1994) (No. 93-1121). When Congress enacted Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. IV 1992), the judgment in *Plaut* was final, the case having been dismissed as untimely pursuant to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and the time for appeal having run. Pursuant to Section 27A(b), plaintiffs petitioned the district court for reinstatement. The district court dismissed plaintiffs' petition, and the Court of Appeals for the Sixth Circuit affirmed, both courts holding that Section 27A(b) was an unconstitutional exercise of legislative authority. *See Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993). A petition for a writ of certiorari has been filed seeking review in this Court of the court of appeals' decision. That petition is pending.

The interest of *amici* is that this Court's decision in *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), *cert. granted sub nom., Morgan Stanley & Co. v. Pacific Mutual Life Insurance Co.*, 114 S. Ct. 680 (1994), will certainly affect, and will perhaps resolve, the issues in *Plaut*. There is a distinction between the cases, however. In *Pacific Mutual* the Fifth Circuit upheld Section 27A(b); in *amici*'s case, and in the one other circuit in which the application of Section 27A(b) to a final judgment has been addressed, Section 27A(b) was struck down as unconstitutional. *See Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993).

Amici are participating in order to brief fully the constitutional history of the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as well as its application to the case at bar. Along with the Sixth and Tenth Circuits, *amici* believe

that the principle in *Hayburn's Case* – that final judicial decisions cannot be subject to revision by another branch of government – renders Section 27A(b) unconstitutional. Yet, inexplicably, the Fifth Circuit's decision on review in this Court neither discusses nor refers to *Hayburn's Case*. Although there are competent counsel representing the parties before this Court, they will need to address the many issues discussed by the Fifth Circuit. *Amici* therefore respectfully submit this brief to ensure full discussion of the one point they believe ought to be central to this Court's decision: Section 27A(b) is contrary to the rule established in *Hayburn's Case*, and thus unconstitutional.

SUMMARY OF ARGUMENT

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), established the principle of judicial finality: The final decisions of Article III courts must be binding and conclusive upon the parties, and are not subject to being overturned or modified by the legislative or executive branches. Understanding the rule in *Hayburn's Case* requires understanding its important historical antecedents. Immediately following the American Revolution, separation of powers was seen as a way of preventing executive tyranny by insulating the legislative branch. In practice, however, this separation resulted in legislative hegemony. Prior to the Philadelphia Convention the legislatures of the states committed numerous abuses, including the constant usurpation of the judicial function. Thus, the framers of the Constitution recognized that in order to limit legislative power they needed to supplement the separation of

powers with a system of checks and balances. Chief among these checks was an independent judiciary. But judicial independence was meaningless without what Corwin called the "highest attribute" of the judiciary's function: The power to render final judgments. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 516 (1925). This critical aspect of judicial independence was established in *Hayburn's Case*, and has been the law ever since.

In Section I of the Argument, *amici* explain the historical background of the rule in *Hayburn's Case*, and the evolution and adoption of the rule. Then, after explaining how Section 27A(b) violates the rule of judicial finality established in *Hayburn's Case*, they respond to arguments that the rule does not govern this case. In Section II, *amici* explain that this Court may nonetheless avoid the constitutional question by interpreting Section 27A(b) as inapplicable to judgments that were final at the time Section 27A(b) was adopted.

ARGUMENT

As applied to final judgments from which an appeal could no longer be taken, Section 27A(b) violates the rule of judicial finality set out in *Hayburn's Case*. *See* Section I, *infra*. This constitutional issue need not be reached, however: Section 27A(b) can and should be read in a way that avoids application to the very small number of cases that were final at the time of its enactment. *See* Section II, *infra*.

I. TO THE EXTENT IT APPLIES TO JUDGMENTS THAT ARE FINAL AND FROM WHICH AN APPEAL COULD NOT BE TAKEN, SECTION 27A(b) VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS BY OVERTURNING THE FINAL DECISION OF AN ARTICLE III COURT.

It is a bedrock principle of American jurisprudence that the final decisions of Article III courts may not be revised, overturned or otherwise modified by any other branch of government. This principle of judicial finality was established in *Hayburn's Case*, and has never been disturbed. As the Tenth Circuit observed in *Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993), outside of the case presently before this Court, "we cannot locate a single case where a court has upheld an attempt by Congress to upset a final, nonappealable judgment in a case between private parties." *Id.* at *9 (footnote omitted).

A. The Rule That Final Judicial Decisions Must Be Respected Has Firm Roots In The Understanding Of Separation Of Powers That Informed The Drafting Of The Constitution.

The rule in *Hayburn's Case* resulted from the evolution of the doctrine of separation of powers from the time of the American Revolution to the ratification of the United States Constitution. During that period, the former colonists' views on separation of powers changed dramatically leading to the incorporation in the Constitution of the system of checks and balances. M.J.C. Vile, *Constitutionalism and the Separation of Powers* 153 (1967). One of the checks ultimately deemed most vital by the

Americans who ratified the Constitution was the existence of an independent judiciary. Vile, *supra*, at 157-58; William S. Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 Am. Pol. Sci. Rev. 32, 43 (1928). And integral to judicial independence was the rule that the final decisions of the judiciary could not be disturbed by another branch of government. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Although separation of powers was much discussed by the revolutionaries, "the meaning it came to acquire for Americans was not the one it possessed for them at the time of Independence." Gordon S. Wood, *The Creation of the American Republic 1776-1787* 152 (1969); *accord* Vile, *supra*, at 134; Corwin, *supra*, at 514. The early understanding focused on the concerns that motivated the Revolution, primarily, if not exclusively, curtailing despotic executive authority. Wood, *supra*, at 157. Following the Revolution, foremost on the minds of those revolutionaries was adherence to the democratic ideal, as embodied in the legislative branch. *Id.* at 157-58. Accordingly, the separation of powers the revolutionaries had in mind was, at most, a division of the executive and legislative branches. *Id.* at 159; Vile, *supra*, at 137-38 (judiciary not elevated to same level nor given same independence as legislative and executive branches).

Despite the bipolar *theory* of separation of powers prevalent in the post-Revolution years, separation of powers in *practice* most often meant legislative hegemony. Vile, *supra*, at 134, 143; Corwin, *supra*, at 514. "In every state the most earnest efforts to keep the several departments of government within their constitutional limits were defeated by the encroachments of the legislature

upon the executive and the judiciary." Carpenter, *supra*, at 32-33. In reality, governmental control came almost completely to vest in the legislature. *Id.* at 34; Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Va. L. Rev. 1253, 1262 (1988).

In the years following the Revolution, popular control soon resulted in disturbing abuses. Contemporary reports were full of the excesses of the state legislatures. *See generally*, Vile, *supra*, at 143-44; Corwin, *supra*, at 514-21. Edmond Randolph, for example, chastised the Virginia legislature for conduct of "a most striking and shocking nature": Condemning a man by bill of attainder "[w]ithout being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed." Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 394 n.19 (1935). Randolph argued that "every thing has been drawn within the legislative vortex," *id.*, words Madison echoed in *The Federalist No. 48*: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." *Id.* at 333 (James Madison) (Jacob E. Cooke ed., 1961).

Particularly prominent and well-documented in this pre-constitutional period was the constant usurpation of the judicial function by the state legislatures. Vile, *supra*, at 143; Wood, *supra*, at 154-56; Corwin, *supra*, at 514; Sharp, *supra*, at 393. In part, this state of affairs was born of necessity. There were too few trained judges and lawyers, and so the legislative assemblies were required to take up many judicial tasks. Wood, *supra*, at 154; Corwin,

supra, at 515. But there was a theoretical basis for this combination of functions as well. To the revolutionaries, from whose perspective there were only *two* powers that required separating, it was common to see the judicial power as a part of the executive. *See* Wood, *supra*, at 159 ("the judicial power is only a branch of the executive, the CHIEF of every country being the first magistrate") (quoting contemporary author). As the Revolution progressed, however, and as the legislative branch gained ascendancy, it became accepted that the law ought to operate in the hands of the people. Carpenter, *supra*, at 34. "The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it." Wood, *supra*, at 161. Thus, usurpation of judicial functions by the legislative branch progressed naturally from the transfer of power from the executive to popular assemblies.

The legislature's dominance of the judiciary was evident throughout the newly independent country. For example, after the Rhode Island Superior Court suggested a law might be unconstitutional, the legislature held a special joint session and required the judges to attend and defend the court's decision. The judges escaped impeachment but were not reappointed when their terms expired. *See* 1 Charles G. Haines, *The American Doctrine of Judicial Supremacy* 105-12 (1932) (discussing 1786 case of *Trevett v. Weeden*). Similarly, the North Carolina legislature brought charges against judges who rendered an adverse decision and demanded the judges appear to defend themselves. *Id.* at 112-20 (discussing 1787 case of *Bayard v. Singleton*). Madison documented

similar abuses. Quoting Jefferson in regard to the Virginia legislature, Madison wrote: "They have accordingly *in many* instances *decided rights* which should have been left to *judiciary controversy*." *The Federalist No. 48*, at 336 (James Madison) (Jacob E. Cooke ed., 1961). Madison observed similar conduct by the Pennsylvania legislature: "The salaries of the Judges, which the [state] Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination." *Id.* at 337.

Legislative interference with the judicial function often took the form of upsetting final judgments or simply ordering the readjudication of a settled controversy. The New Hampshire legislature, for example, "freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes." Corwin, *supra*, at 514. New Hampshire's experience was not unique nor "more aggravated" than other states, Corwin reports, noting that such practices "were widespread." *Id.* at 515.[2]

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[2] The Provincial Legislature of Massachusetts also usurped judicial powers, including ordering the readjudication of settled controversies. For example, the legislature suspended the levying of an execution upon a judgment from a court; it voided a court's order to seize an individual's homestead as part of a judgment; and it ordered a court to hear an appeal and suspended the judgment of the lower court. *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208, 210-12, 217 (1901-02).

A case in point was Pennsylvania, where the legislature remitted fines, disallowed judicially established claims, and set aside jury verdicts. *Id.* at 520.

The ultimate result of this disturbing accretion of all governmental power to legislative bodies was, of course, nothing less than our modern conception of separation of powers, including the idea of checks and balances. The challenge of the Philadelphia Convention was to design a system in which legislative power could be contained. Vile, *supra*, at 152-58. The idea of checks and balances was seen as a way to limit illegitimate legislative activity:

> By the time that the Convention met, important sections of opinion among its members had already accepted the two central positions of modern American constitutional thought. The separation of powers was by this time, in the words of a contemporary pamphleteer, 'a hackneyed principle', or a 'trite maxim'. Now, however, *the idea of checks and balances*, rejected at the height of revolutionary fervour, *was considered an essential constitutional weapon to keep all branches of government, and especially the legislature, within bounds.*

Id. at 153 (emphasis added) (footnote omitted).

From this determination to check legislative abuses came the creation of an independent judiciary. Vile, *supra*, at 158; Wood, *supra*, at 453-54 ("The department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary."). The Convention established the judiciary as a co-equal, third-branch of government. U.S. Const., art. III. In order to guarantee independence, the judges were given life

tenure, and protection against diminution of salary. *Id.* § 1.[3] In *The Federalist No. 78*, Hamilton echoed Montesquieu as to the need for an independent judiciary to guarantee liberty: "[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . . " *Id.* at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The Convention's efforts to ensure an independent judiciary produced two important ideals of constitutional liberty, one perhaps more well-known than the other, but the latter equally important. First, of course, is the practice of judicial review. Although the Constitution is silent on this point, many of the framers intended judicial review of the constitutionality of legislative enactments. Vile, *supra*, at 158; Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. Rev. 747, 749 (1992); Benjamin F. Wright, Jr., *The Origins of the Separation of Powers In America*, Economica 169, 183 (May 1933). The Federalist Papers anticipated and justified the practice. *The Federalist No. 78*, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), justly renowned, set it in stone.

But judicial review is meaningful only if the judiciary is independent, and there is not judicial independence if final judicial decisions can be overturned at will by the

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[3] The Convention explicitly rejected a Council of Revision that would have intermingled judges and other officials in reviewing the constitutionality of legislative enactments. Max Farrand, *The Framing of the Constitution of the United States* 156-57 (9th ed. 1913); Carpenter, *supra*, at 42.

legislative or executive branches. As Corwin explained: "[T]o produce judicial review, the notion of the Constitution as law must be accompanied by the principle of the finality of judicial constructions of the law . . . ." Corwin, *supra*, at 524. Thus, he condemned the pre-constitutional legislatures, accusing them of "the withholding from judicial power of that which, to the modern way of thinking, is its highest attribute – to wit, *power of deciding with finality*." *Id.* at 516 (emphasis added). Hamilton, seeking to justify the check of an independent judiciary, drew the line that governs even today: "*A legislature without exceeding its province cannot reverse a determination once made, in a particular case*; though it may prescribe a new rule for future cases." *The Federalist No. 81*, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). In order for the judiciary to function independently, its final judgments in specific cases must be respected, without regard to whether popular assemblies approve of the result.

B. *Hayburn's Case* Preserves An Independent Judiciary By Ensuring That Neither Congress Nor The Executive Branch Overturns Or Otherwise Revises The Final Decisions Of An Article III Court.

In *Hayburn's Case* the twin pillars of the judicial check – the power of judicial review and the principle of

judicial finality – found voice.[4] *Hayburn's Case* involved the Invalid Pensions Act, passed to provide pensions to Revolutionary War veterans. Lacking an administrative bureaucracy, Congress pressed into service the circuit judges, who would hear the claims of veterans and rule upon their validity. Judicial decisions were not final, however: Circuit Court determinations could be overturned by the Secretary of War for "fraud or imposition," and the last word on payment rested with Congress. Although this Court never issued an opinion on the merits in *Hayburn's Case*,[5] appended to the report of the case are the opinions of the Supreme Court Justices, riding circuit, speaking to the validity of the enactment.[6]

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[4] *See generally* Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 590-613; Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527.

[5] *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10. After Congress amended the statute to provide for alternative relief for the pensioners, the Court dismissed the case on grounds of mootness. The unconstitutional statute was repealed by Congress and replaced by one that did not require participation by the Circuit Judges. Bloch, *supra*, at 590 n.94; Marcus & Teir, *supra*, at 528 n.4.

[6] The written opinions reflect the views of five of the six Justices then sitting on this Court. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10. Professor Bloch reports that Justice Johnson also expressed his views elsewhere as to the unconstitutionality of the Invalid Pensions Act. *See* Bloch, *supra*, at 591-92 (noting that Justice Johnson, along with Judge Bee, refused to process six applications under the Act because he believed the court could not "constitutionally take Cognizance of and determine on the said Petitions").

The judicial role required by the Invalid Pensions Act was unanimously rejected by the judges in *Hayburn's Case* because the statute violated the principle of judicial finality. 2 U.S. (2 Dall.) at 409. That principle is straightforward: The final decisions of Article III courts cannot be subject to revision by any other branch. *Id.* Thus, reasoned the judges in *Hayburn's Case*, because they were being asked to render a decision subject to revision, the request violated the Constitution by assigning to them a task not "of a judicial nature." *Id.* at 410 n.2 (opinion of the Circuit Court of Pennsylvania (Justices Wilson and Blair, and Judge Peters)).

Although the Justices wrote separately and from locations distant, their reasoning bore great similarity. The Circuit Court of New York (Chief Justice Jay, Justice Cushing, and Judge Duane) stated that the tasks assigned under the Act were not "properly judicial" because the Act "subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the Legislature." *Id.* Similarly, the Circuit Court of Pennsylvania (Justices Wilson and Blair, and Judge Peters) complained that the court's judgments "might . . . have been revised and controled by the legislature, and by an officer in the executive department." *Id.* "Such revision and control," the Court stated, "we deemed radically inconsistent with the independence of that judicial power which is vested in the courts . . . . " *Id.* Finally, the Circuit Court of North Carolina (Justice Iredell and Judge Sitgreaves) stated "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the secretary at war . . . this subjects the

decision of the court to a mode of revision which we consider to be unwarranted by the constitution." *Id.* Summing up, the North Carolina Circuit Court stated, in words that govern here:

> [N]o decision of any court of the United States can, under any circumstances . . . agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

Id.

The importance of the rule in *Hayburn's Case* should be self-evident. The judiciary was conceived by the people as an important check on legislative power, and thus a guarantee of the rights of private citizens. *See* Corwin, *supra*, at 517 (explaining that the "structural and functional shortcomings of the early state constitutions played directly into the hands of both popular and doctrinal tendencies which distinctly menaced what Madison called 'the security of private rights' "). That check is worthless, however, if it may be overturned at will by the legislative branch, effecting popular will as against private rights. In order to serve as a check, the final judgments of the judicial branch must be respected. It is telling that the first act of judicial review by Justices of this Court was taken in the name of judicial finality. *See* Marcus & Teir, *supra*, at 530 (remarking that the New York Circuit Court's views "represented the first instance of federal judges discussing the constitutionality of a piece of federal legislation").

Perhaps the most powerful paean to the absolute nature of the principle of judicial finality is found in Chief Justice Taney's opinion for the Court in *Gordon v. United States*, 117 U.S. 697 (1865), published after his death.[7] *Gordon* involved the establishment of the Court of Claims. The statute there at issue provided for payment of the judgments of the Court of Claims, or of the Supreme Court if an appeal was taken, but no payment could be made until "the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment." *Id.* at 698. While this Court upheld the statute with regard to the Court of Claims, it determined that as applied to the Supreme Court, the statute violated the principle of judicial finality. *Id.* at 704.

Writing to overturn the statute at issue in *Gordon*, Chief Justice Taney stated that the judgment of an Article III court must be "*final and conclusive* upon the rights of the parties." *Id.* at 702 (emphasis added). "[N]o principle of constitutional law has been more firmly established or constantly adhered to . . . . " *Id.* at 704.[8] That rule, that judicial decisions must be "final and conclusive, and may

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[7] The judgment in *Gordon v. United States* was published at 69 U.S. (2 Wall.) 561 (1865). That judgment indicates an opinion would be forthcoming. Some twenty years later the Court assented to printing the opinion Chief Justice Taney had prepared, which the Clerk had located at the suggestion of members of the Court. 117 U.S. at 697.

[8] While legislative encroachments upon the judiciary are rare, the principle of finality is relied upon every day. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (discussing *res judicata*).

not be subject to revision by another branch of government," has been adhered to consistently by this Court. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647-48 (1875); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-52 (1852).[9]

C. The Rule In *Hayburn's Case* Governs This Case.

Resolution of this case turns on a straightforward application of the rule that neither the legislative nor the executive branch may overturn a final decision of an Article III court. This rule represents, again to quote Corwin, the "highest attribute" of an independent Article

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[9] *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), is not to the contrary. In that case, Congress provided for adjudication of certain claims of the Sioux against the United States, although the claims had been litigated previously and final judgments had been entered. Rather than finding the statute that authorized relitigation a violation of *Hayburn's Case*, this Court correctly observed that all Congress had done was waive the United States' defense of *res judicata*. *Id.* at 407 (finding that "Congress had not 'reversed' the Court of Claims' holding that the claim was barred by res judicata . . . . [I]t only was providing a forum so that a new judicial review of the Black Hills claim could take place"). Moreover, it is noteworthy that *Sioux Nation* involved litigation in which the United States was a party. No case involving purely private parties authorizes Congress to overturn or otherwise review a judicial decision.

Nor are *Freeland v. Williams*, 131 U.S. 405 (1889), or *Fleming v. Rhodes*, 331 U.S. 100 (1947), to the contrary. Neither *Fleming* nor *Freeland* involve revision or modification of the judgment of an Article III court by Congress, and therefore, neither case has any relevance whatsoever to the separation of powers issue presented by Section 27A(b).

III court. Corwin, *supra*, at 516. Yet, Section 27A(b), to the extent it applies at all to this case, squarely violates the rule.

In this case, as in *Plaut* and *CIGNA*, the courts had determined that the complaints were untimely filed, pursuant to this Court's decision in *Lampf*. Final judgment was entered in each case, and in each case the time for taking an appeal expired with no appeal taken. Those decisions were the final decisions of Article III courts. *See Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965) (defining "final judgment"); *cf. Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (retroactive application of new law only applies to those cases, civil and criminal, "still open on direct review"). Despite those final decisions, with Section 27A(b) Congress nonetheless ordered the Article III courts to adjudicate the cases again.

D. Arguments Advanced To Defend Section 27A(b) In Light Of *Hayburn's Case* Are Unavailing.

It seems difficult to avoid the conclusion that, to the extent it applies to overturn final judgments, Section 27A(b) runs afoul of the rule of judicial finality. Nonetheless, in the various proceedings in this and other Section 27A(b) cases, arguments have been advanced as to why what appears obvious is not so. These arguments largely reflect a failure to confront squarely the principles of judicial finality, and most of the arguments are flatly belied by the historical record. *Amici* submit that none of these arguments avoid the conclusion that as applied to final decisions from which timely appeal could not be taken, Section 27A(b) is unconstitutional.

1. It Is Irrelevant That Section 27A(b) Ordered Readjudication Rather Than Prescribing A Result.

It is irrelevant that Congress simply required readjudication of the claims that had been finally decided, rather than prescribing a result. The rule in *Hayburn's Case* is not a prohibition on telling a court *how* to decide a case. It is a prohibition on failing to give "binding and conclusive" effect to the final judgment of an Article III court. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948); *Gordon v. United States*, 117 U.S. at 702 ("final and conclusive") (Taney, C.J.). The prohibition on prescribing certain rules of decision comes instead from *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). But *Hayburn's Case* provides an entirely separate rule from *Klein*. *See Plaut*, 1 F.3d 1487, 1497 n.14 ("we believe § 27A(b) forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way").

The historical record makes clear that the crux of the rule in *Hayburn's Case* is finality, without regard to whether the legislature actually resolves the dispute among the parties. Time and again on the list of grievances about legislative usurpation of judicial independence were complaints about legislatures reopening final judgments. These complaints were separate from, and in addition to, concerns about overturning on the merits.[10] Both forms of revision were equally untenable.

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[10] *See, e.g.*, Corwin, *supra*, at 514-15 (New Hampshire legislature "vacated judicial proceedings, suspended judicial

2. It Is Irrelevant That Congress Is Free To Prescribe A Rule Governing Future Cases.

Similarly, it also is irrelevant that Congress remains free at any time to prescribe a rule applicable in future cases. There is no doubt that Congress is free to prescribe rules to govern future events. *The Federalist No. 81*, at 545 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) (Congress may not reverse judicial determination "though it may prescribe a new rule for future cases"). In fact, when Congress so acts, the decision is applicable to any case *pending on appeal* at the time of the enactment. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

The critical point in this case is that no matter how one characterizes what Congress did, the case was *not* pending on appeal at the time Congress acted. The case was final. That the judgment may rest on a statute of limitations is immaterial: To the extent the judgment spoken of is a final judgment, it is immune from legislative revision, even though the statute of limitations surely is not. To hold otherwise is to reduce *Hayburn's Case* to a nullity.[11]

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actions, annulled or modified judgments"); *id.* at 520 (Pennsylvania legislature remitted fines and disallowed judicially established claims); *Judicial Action by the Provincial Legislature of Massachusetts*, *supra*, at 210 (legislature overturned execution order); *id.* at 217 (legislature suspended judgment).

[11] It likewise certainly must be irrelevant (although it has been argued) that the statute Congress enacted is seen – at least by the plaintiffs in these cases – as undoing the mischief of this Court's decision in *Lampf*. The revolutionary legislatures no doubt often felt – as Congress apparently felt when it sought to undo the work of this Court – that the judicial branch had gone

3. It Is Irrelevant That Congress' Interference With Final Judgments Took The Form Of Ordinary Legislation.

The United States repeatedly has argued that Congress in enacting Section 27A did not sit as a "court of errors" but performed a "quintessentially legislative" act of prescribing the statute of limitations. But it plainly is of no significance, as argued above, that the reversal of Article III decisions took the form of a statute *of limitations*. The reality of the matter is that the legislative decision overturned a final judicial decision. The United States may be advancing an argument that Section 27A(b) was quintessentially legislative because it took the form

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astray. That sense of "Right and Justice" is precisely what motivated the revolutionary legislatures:

> They continually tried cases in equity, occasionally extended temporary equity power to some common law court for a select purpose, and often granted appeals, new trials, and other kinds of relief in an effort to do what "is agreeable to Right and Justice." As a committee of the Maryland Assembly declared in 1719, "a legislative body is not tied to common rules, for if the thing be just they make new rules or dispense with old ones as to the manner of doing it."

Wood, *supra*, at 155. But as the Constitution's framers came ultimately to understand, there must be a limitation upon the *ad hoc* undoing of judicial decisions by the legislative branch. That limitation is expressed in *Hayburn's Case*.

Similarly, it is well understood that a judgment is final and conclusive whether or not it is based on a correct understanding of the law: "Nor are the res judicata consequences of a final judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

of a statute. But the framers foresaw and rejected this argument over two hundred years ago. In *The Federalist No. 48* Madison wrote:

> If therefore the Legislature assumes executive and judiciary powers, no opposition is likely to be made; *nor if made can it be effectual; because in that case, they may put their proceeding into the form of an act of Assembly, which will render them obligatory on the other branches.* They have accordingly in many instances decided rights which should have been left to judiciary controversy . . . .

Id. at 336 (James Madison) (Jacob E. Cooke ed., 1961).

The difficulty with this argument, if indeed the United States is making it, is that it excuses legislative action simply because it is in the form of a statute, without regard to what the statute does. But labeling an act "quintessentially legislative" does not avoid its unconstitutional impact. "The concept of legislative power here expressed is obviously a purely formal one: 'legislative power' is any power which the legislative organ may choose to exercise by resort to the ordinary parliamentary processes." Corwin, *supra*, at 516. Indeed, because the only way Congress can act is through the legislative process, *see I.N.S. v. Chadha*, 462 U.S. 919 (1983), the proper focus is upon the impact of the legislative act. What Congress has done is to reverse final judgments, and that is impermissible.

4. The Rule In *Hayburn's Case* Unquestionably Is That Decisions Of Article III Courts Must Be "Binding And Conclusive Upon The Parties," And That Such Judgments Are Not Subject To Revision By The Legislative Or Executive Branches.

Finally, there seems to be some argument that *Hayburn's Case* does not even stand for the proposition for which *amici* cite it. Thus, the United States has made the following odd argument:

> Defendants assert that the panel here correctly relied upon *Hayburn's Case* because the Supreme Court there established that neither Congress nor the Executive can disturb a final judgment of an Article III court. This statement is manifestly wrong, and can easily be checked by reading the statements by the Justices in that case.
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> . . . .
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> There is absolutely *no* indication of even the slightest kind that the Justices in *Hayburn's Case* held that Congress cannot enact *new* legislation that has the effect of overriding a prior judgment of a court. Since that is not what happened in *Hayburn's Case*, there would have been no reason for the Justices even to address that question, and they did not.

United States' "Reply to Response to Petition by the United States for Rehearing with an In Banc Suggestion" at 4a-5a, in *Plaut*, 1 F.3d 1487 (see Appendix).

From the time of *Hayburn's Case* to the present, that decision has stood for the proposition that the final decisions of Article III courts are not subject to revision by the

legislative or executive branches. In *Gordon*, Chief Justice Taney stated, with regard to the rule in *Hayburn's Case*, "no principle of constitutional law has been more firmly established or constantly adhered to." 117 U.S. at 704. The decision has been cited numerous times, by this Court[12] and by the lower courts,[13] for just this proposition. Numerous commentators are in accord.[14]

It is true that in *Hayburn's Case* Congress did not enact a law overturning a judicial decision. That is because the courts that spoke in that case did not give Congress a chance to do so. Rather than subject their rulings to congressional overturning, the courts declined to perform the statutory duties, the first instance in which a court invalidated an Act of Congress. But the courts were clear as to their reason for doing so: It was because Article III final judgments are not subject to revision. That rule is clear, and *amici* submit that as to the small number of Section 27A(b) cases that had gone to final

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[12] *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 391-92 (1980); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400 & n.29 (1934); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-52 (1852).

[13] *See, e.g., Town of Deerfield v. F.C.C.*, 992 F.2d 420, 427-28 (2d Cir. 1993); *In re President's Commission on Organized Crime*, 783 F.2d 370, 375 (3d Cir. 1986); *In re Sharon Steel Corp.*, 100 B.R. 767, 774 (Bankr. W.D. Pa. 1989).

[14] *See, e.g.*, 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 2.13(e) (2d ed. 1992); Bernard Schwartz, *A History of the Supreme Court* 25-26 (1993); Charles A. Wright, *The Law of Federal Courts* § 12 & n.28 (4th ed. 1983); Bloch, *supra*, at 592; Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 646-47 (1992); Marcus & Teir, *supra*, at 530.

judgment, its application is equally clear: Section 27A(b) cannot operate to disturb final, non-appealable judgments.

II. THIS COURT DOES NOT NEED TO ADDRESS THE CONSTITUTIONAL QUESTION BECAUSE CONGRESS DID NOT INTEND SECTION 27A(b) TO REACH FINAL DECISIONS.

The Supreme Court will not address a constitutional question "if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). When faced with the argument that a statute is unconstitutional, the Court therefore must "first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *accord Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2283 (1993); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). If a constitutionally valid interpretation is possible, it is the Court's "plain duty" to adopt such an interpretation. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Section 27A(b) can and should be interpreted in a constitutionally valid manner. By its terms, Section 27A(b) directs the reinstatement of a "private civil action" that had been dismissed as time barred after the *Lampf* decision, but it does not evince an intent by Congress to undo a "final judgment," i.e. a case "where the judgment . . . was rendered, the availability of appeal exhausted, and the time for petition for certiorari had

elapsed." *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965); *accord Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988) (interpreting Congress' retroactive application of law to "actions" brought prior to a certain date as being inapplicable to final judgments), *cert. denied*, 490 U.S. 1090 (1989). Judge Keith adopted this distinction in *Plaut*. In his separate opinion, Judge Keith refused to strike down Section 27A(b) in its entirety, reasoning that it should be interpreted to apply only to those cases still on appeal:

> In the case at hand, Congress was unable to protect these litigants under section 27A(b), because by the time 27A(b) was enacted, the time period for filing an appeal had passed. Nevertheless, for those litigants who did appeal the district court's initial dismissal of their claim, section 27A(b) does not disturb final judgments, and is therefore consistent with separation of powers requirements.

1 F.3d at 1500 (Keith, J., concurring in part and dissenting in part).

Other circuit courts that have upheld the constitutionality of Section 27A when applied to pending cases have also recognized the constitutional implications of reinstating a "final judgment."[15] Two district courts have

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[15] *See Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 83 (2d Cir. 1993) ("Because the claims at issue had not passed into final judgment within the constitutional definition of that term at the time that Judge Lasker reinstated Johnson's complaint, Andersen's challenge to the application of § 27A(b) fails."); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993) ("It is well established that a party's property right in a cause of action does not vest 'until a final, unreviewable judgment has been obtained.' At the time that Section 27A was signed into law, no final judgment had been entered in the instant case.") (citations omitted); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 277 (7th Cir. 1993) ("[I]n the instant case there is no final judgment to be upset. At the time that section 27A was passed, this case was pending on appeal."); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) ("none of these cases involve 'final judgments' in the constitutional, separation of powers sense of the term").

avoided the constitutional problems raised by Section 27A(b) by interpreting the statute to not apply to final and unappealed judgments.[16] *See also Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 823 (D.C. Cir. 1974) (court unwilling to interpret act as disturbing final judgments without clear evidence that act was so intended).

The legislative history of Section 27A demonstrates Congress' intent to apply Section 27A(b) only to those suits that were dismissed but which had not yet become final. In discussing the bill that was to become Section 27A, its co-sponsor stated that the bill would not upset the final judgment regarding the parties whose rights

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[16] *Barr v. McGraw-Hill*, 1992 WL 196754, at *7 n.17 (S.D.N.Y. Aug. 3, 1992) ("the Court finds that because section 27A(b) stops at allowing the reinstatement of section 10(b) actions, and does not speak of judgments, no constitutional problem is presented"); *Rabin v. Fivzar Assocs.*, 801 F. Supp. 1045, 1055 (S.D.N.Y. 1992) ("Although § 27A(b) directs courts to reinstate cases dismissed as time barred subsequent to June 19, 1991 if they would have been timely under the law existing on that date, it does not speak specifically to cases in which final judgment has been entered and the time for appeal has expired.").

were adjudicated in *Lampf*. On November 21, 1991, Senator Garn addressed Senator Riegle, co-sponsor of the "Securities Investor Protection Act." Senator Garn stated that it was his understanding that the bill "is not intended to apply to or in any way affect the parties or the claims in the *Lampf* decision itself. The Supreme Court's final judgment in the *Lampf* case will remain intact for the parties in that case." 137 Cong. Rec. S17,382-01 (1991). Senator Garn then asked Senator Riegle if this was the correct interpretation of the bill. *Id.* Senator Riegle replied, "Yes, that is correct." *Id.* Yet if Section 27A(b) were read to apply to the final judgment in this case, it would necessarily apply to the litigants who were before this Court in *Lampf*.

Consistent with the legislative history, Section 27A(b) can and should be interpreted so as not to overturn final judgments. If Section 27A(b) overturns final judgments, then it violates separation of powers and the rule in *Hayburn's Case*. This Court need not resolve the question, however. It is the usual practice of this Court to assume that Congress enacted legislation that does not present such a "serious constitutional question." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Daylo*, 501 F.2d at 818-19, 823. *Amici* respectfully submit that would be the appropriate course in this case.

CONCLUSION

Accordingly, *amici* respectfully request this Court either rule that Section 27A(b) does not reach cases that had gone to final judgment at the time of its enactment, or rule – alternatively – that if those cases are within the ambit of Section 27A(b), the section violates the rule in *Hayburn's Case*.

Respectfully submitted,

ELIZABETH S. FEAMSTER
FOWLER, MEASLE & BELL
300 W. Vine Street
Kincaid Towers
Suite 650
Lexington, Kentucky 40507
(606) 252-6731

JAMES E. BURNS, JR.
KEVIN P. MUCK
JOHN MISSING
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 442-0900

Counsel for Amicus Curiae Kemper Securities, Inc. (formerly Bateman Eichler, Hill Richards, Inc.)

BARBARA B. EDELMAN
BARRY FRIEDMAN*
G. CHRISTOPHER VAN BEVER
STEVEN L. SNYDER
WYATT, TARRANT & COMBS
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

Counsel for Amicus Curiae Spendthrift Farm, Inc.

**Counsel of Record*

APPENDIX

United States' "Reply to Response to Petition by the United States for Rehearing with an In Banc Suggestion" in *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir.), *reh'g denied*, 11 F.3d 572 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) 1a

No. 92-5591

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ED PLAUT, *et al.*,
Plaintiffs-Appellants,
v.
SPENDTHRIFT FARM, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

REPLY TO RESPONSE TO PETITION BY THE UNITED STATES FOR REHEARING WITH AN IN BANC SUGGESTION

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

FRANK W. HUNGER
Assistant Attorney General

KAREN K. CALDWELL
United States Attorney

DOUGLAS LETTER
BARBARA C. BIDDLE
SCOTT R. McINTOSH
(202) 514-3602
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

The United States and the plaintiffs/appellants in this case petitioned for rehearing *in banc*, and the Court directed the defendants/appellees to file a response. Defendants' response warrants this short reply making two points.

First, defendants do not rebut our contention that this case involves a question of exceptional importance. Second, defendants' reliance upon the various statements by the Justices in the moot controversy in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) is manifestly wrong because it misrepresents what was at stake there, and thus the meaning of those statements.

1. As we pointed out in our rehearing petition, several factors combine to make this one of those rare instances in which rehearing *in banc* consideration is warranted.

A panel of this Court has, over a partial dissent, struck down as unconstitutional on separation of powers grounds a duly enacted Act of Congress. This ruling is in direct conflict with a contemporaneous decision by the Fifth Circuit. And, the reasoning employed by the panel of this Court has been rejected by the Ninth and Tenth Circuits in upholding a related subsection of the statutory provision at issue.

Defendants quibble in unimportant ways with our reliance on these factors. They say that the Fifth Circuit in its *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993) opinion did not address *Hayburn's Case*. However, *Hayburn's Case* was specifically discussed in the briefs filed in the Fifth Circuit. In any event, the issues in this case and in *Pacific Mutual* are

identical, and the panel's ruling here accordingly creates a direct conflict among the circuits.

Defendants point out that the six circuits other than the Fifth Circuit that have to date upheld Section 27A have done so in the context of cases arising under subsection (a) of that section, while this case involves subsection (b). We are well aware of the difference between these two sections. However, what we explained in our rehearing petition (at 2) is that the constitutional analysis employed by the panel of this Court here is inconsistent with that used by the Ninth Circuit in *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993), and the Tenth Circuit in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993). Indeed, one of the district court rulings reversed in *Gray* by the Ninth Circuit cited *Hayburn's Case* (see *In re Brichard Securities Litigation*, 788 F. Supp. 1098, 1107 (N.D. Cal. 1992)), and that case was discussed at length by the parties in their briefs before the Ninth Circuit. This Court need only glance at the opinions from the Fifth, Ninth, and Tenth Circuits to see the inconsistency in approach between them and the panel here.

Thus, the decision by the panel here is quite isolated among the courts of appeals.

A question of exceptional importance is *always* involved when a court of appeals invalidates an Act of Congress, a rare occurrence. It is even rarer when an appellate court does so on separation of powers principles, which go to the heart of our system of government.

Moreover, the Act of Congress struck down here is *not* some obscure provision secretly inserted by a single

legislator without any discussion into a gargantuan bill. To the contrary, Section 27A was debated in Congress and was the product of complete legislative consideration.

In sum, defendants have merely argued that the panel here was right. They have not in any way undermined our contention that consideration by this full Court is warranted if the Court is going to strike down a thoroughly considered Act of Congress on separation of powers grounds, in direct conflict with a recent ruling by another circuit, and using reasoning that was rejected by other circuits also in recent opinions. Such a serious act and creation of a clear conflict in the circuits calls for *in banc* review by this Court. We note that four other circuits make clear in their rules or operating procedures that creation of a circuit split like this is a ground for rehearing *in banc*. See D.C. Circuit Rule 14; Seventh Circuit Rule 40(c); Ninth Circuit Rule 35-1; Fourth Circuit IOP 40.5.

2. Defendants assert (Response at 2, 3) that the panel here correctly relied upon *Hayburn's Case* because the Supreme Court there established that neither Congress nor the Executive can disturb a final judgment of an Article III court. This statement is manifestly wrong, and can easily be checked by reading the statements by the Justices in that case.

The statute at issue in *Hayburn's Case* authorized the Secretary of War to revise judgments of an Article III court regarding pension awards to Revolutionary War veterans. See Act of March 23, 1792, ch. 11, 1 Stat. 243. Under the statute, federal circuit courts were directed to examine pension applicants and "transmit [to the Secretary of War] the result of their inquiry, in case * * * the

applicant should be put on the pension list." *Id.* at 244. The Secretary of War was then authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress" in any case in which he had "cause to suspect imposition or mistake." *Ibid.*

The Justices made clear in their various statements in *Hayburn's Case* that neither the Executive Branch nor Congress can "sit as a court of errors" (2 U.S. at 410) reviewing decisions by Article III courts.

There is absolutely *no* indication of even the slightest kind that the Justices in *Hayburn's Case* held that Congress cannot enact ***new*** legislation that has the effect of overriding a prior judgment of a court. Since that is not what happened in *Hayburn's Case*, there would have been no reason for the Justices even to address that question, and they did not.

As we pointed out in our rehearing petition, seven circuits have concluded that, in enacting Section 27A, Congress did provide new legislation having the effect of overriding prior rulings. It is not clear to us if the panel here indeed meant to disagree with these circuits on this point, but it might have. See slip op. at 22 n.15 ("In enacting §27A, Congress did not 'change the underlying law' * * * ").

If the panel indeed held that Congress did not pass any new legislation in enacting Section 27A, rehearing *in banc* is even more appropriate because of the overwhelming court of appeals authority holding otherwise. See slip op. at 11 n.11 (listing rulings by seven circuits upholding Section 27A). If the panel did not, we are quite puzzled as to why defendants believe that *Hayburn's Case* provides

the answer here, and why the panel so ruled. It is precisely because the panel accepted this misconceived argument that a new look by the full Court is needed. Indeed, the failure of the Fifth Circuit in *Pacific Mutual* to discuss *Hayburn's Case* in its opinion, even though that case was raised in the briefs, is quite understandable given the significant difference between the statutory scheme involving Revolutionary War veterans and Section 27A.

3. Finally, we note with interest that defendants do not even attempt to address our reliance in our petition on Supreme Court precedents such as *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), and *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889). Those decisions show that the Supreme Court has upheld statutes that legislatively annul court judgments affecting private rights. Unless defendants can deal with these cases, they have a very difficult time stating a convincing argument that there is some constitutional prohibition against legislation like Section 27A.

Rehearing is needed so that we can in briefing – rather than in the restrictive medium of a rehearing petition – address the various Supreme Court precedents involving legislative overrides of court judgments, and so that the Court can inquire whether defendants have any ways to get around those precedents.

For these reasons, and those stated in our rehearing petition, rehearing *in banc* should be granted.

Respectfully submitted,

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

LESLIE E. SMITH
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

FRANK W. HUNGER
Assistant Attorney General

KAREN K. CALDWELL
United States Attorney

/s/ Douglas Letter
DOUGLAS LETTER
BARBARA C. BIDDLE
SCOTT R. McINTOSH
(202) 514-3602
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

September 27, 1993

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 1993, I have served the foregoing REPLY TO RESPONSE TO PETITION BY THE UNITED STATES FOR REHEARING WITH AN IN BANC SUGGESTION by mailing true copies, first-class postage prepaid, to:

J. Montjoy Trimble
Trimble-Bowling
163 West Short Street
Lexington, Kentucky 40507

Richard C. Ward, Esq.
Wyatt, Tarrant & Combs
The Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507

James E. Burns, Jr., Esq.
Brobeck, Phleger & Harrison
Spear Street Tower
One Market Plaza
San Francisco, CA 94105

Guy R. Colson, Esq.
Fowler, Measle & Bell
400 Bank One Plaza
Lexington, Kentucky 40507

Harry B. Miller, Esq.
Miller, Griffin & Marks
271 West Short Street
Suite 700
Lexington, Kentucky 40507-1292

William E. Johnson, Esq.
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507-1380

L. Clifford Craig, Esq.
Taft, Stettinius & Hollister
1800 Star Bank Center
Cincinnati, Ohio 45202

David Edwards, Esq.
Pillsbury, Madison & Sutro
P.O. Box 7880
San Francisco, CA 94120

/s/ Douglas Letter
Douglas Letter

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MAR 25 1994
OFFICE OF THE CLERK

No. 93-609

In The

Supreme Court of the United States

October Term, 1993

MORGAN STANLEY & CO., INC.,
GOLDMAN SACHS & CO., ERNST & YOUNG,
SALOMON BROTHERS, INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") IN SUPPORT OF RESPONDENT

JAMES M. FINBERG
(Counsel of Record)
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California
94111-3339
Telephone: (415) 956-1000

Attorneys for *Amicus Curiae*
NASCAT

PAUL J. MISHKIN
Berkeley, California

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST

NASCAT is an association of law firms consisting of attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States' securities markets operate freely and efficiently. NASCAT's members frequently represent plaintiffs in a variety of individual and class action cases prosecuted under the federal securities laws.[1] NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetuating securities fraud upon investors in this country.

Specifically with respect to NASCAT's interest in the constitutionality of Section 27A of the Securities Exchange Act, NASCAT's members represent many thousands of plaintiffs with billions of dollars of claims for securities fraud (and in some cases multimillion district court judgments on those claims), whose claims, although timely when filed, were placed in jeopardy by retroactive application of the new statute of limitations for Section 10(b) actions announced in this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). Congress' enactment of Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991), was designed to alleviate the unfairness to those plaintiffs – who had properly

---

[1] NASCAT members also have represented defendants in securities litigation and in other complex cases.

relied on the statutes of limitations in place when they filed their claims – caused by the retroactive application of the new *Lampf* rule and to prevent a windfall to culpable parties who defrauded those plaintiffs.

SUMMARY OF ARGUMENT

This Court's statutory interpretation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.*, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), announcing a uniform federal limitations period for claims brought under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), changed decades of well-established law in most circuits. This Court's holding in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), that a new rule of statutory interpretation applied to the litigants before this Court must be applied to all pending cases, since making decisions about selective prospectivity is not the proper role of courts, led to retroactive application of the new *Lampf* rule. That retroactive application caused widespread unfairness and serious injustice.

Hundreds of thousands of victims of securities fraud who had previously filed legitimate claims in proper reliance on the then-existing statutes of limitations were placed in jeopardy of losing their claims, whose aggregate value exceeded four and one-half billion dollars. Many culpable persons who had defrauded those victims were given the unexpected opportunity to be relieved of well-deserved liability. After consulting with constituents and conducting hearings, Congress enacted legislation,

an amendment to the Securities Exchange Act, relieving the unfairness and correcting the injustice by restoring the status quo prior to the *Lampf* decision for cases pending the day the *Lampf* decision was decided.

Petitioners concede that the legislation Congress enacted, Section 27A, is constitutional with respect to cases that were still pending in the judicial system as of the date of enactment of the legislation.[2] Petitioners contend, however, that Congress is without power to relieve the unfairness and prevent the injustice with respect to cases where a "final,"[3] non-appealable judgment was entered between the date of the *Lampf* decision in June, 1991, and the date of the enactment of Section 27A in December, 1991.

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[2] The seven circuit courts that have reviewed that issue have unanimously held that Section 27A is constitutional with respect to cases that were pending in the judicial system as of the date of the enactment of the legislation. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1841, 123 L. Ed. 2d 467 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co.*, 993 F.2d 269, 273 & n.11 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 278-79 (7th Cir. 1993); *Axel Johnson, Inc. v. Arthur-Anderson & Co.*, 6 F.3d 78 (2d Cir. 1993).

[3] A judicial decision is only "final" if judgment "has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Cases in which judgments are not "final" are "pending."

The rule defendants propose – that Congress may not constitutionally enact legislation assisting unfairly disadvantaged persons because they had the misfortune to have district judges who ruled promptly and because they correctly believed that filing an appeal would have been pointless under then existing law – would be unfair and counterproductive. Such a rule ignores the reality that it takes Congress some time, more than the length of an appeal period, to enact legislation providing transitional rules for new judicial announcements. Such a rule also would create the wrong incentives, since it would encourage people to file frivolous appeals. Most important, such an intrusion on Congressional authority is not grounded in the Constitution or the decisions of this Court.

Contrary to Petitioners' contentions, final judgments are not sacrosanct. This Court has expressly upheld as constitutional federal and state statutes that have divested litigants of final judgments. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Separation-of-powers principles are not violated when, as here, Congress is performing legislative functions, not judicial functions. When amending the Securities Exchange Act to add Section 27A(b), Congress was not sitting as a court of errors or directing the outcome of a particular case. Instead, Congress was performing a traditional legislative function by revising the nation's statutory law. Section 27A(b)'s enactment was a proper

exercise of Congress' legislative power under Article I of the Constitution.

Petitioners' due process argument also fails. The transitory windfall Petitioners and other similarly situated defendants received as a result of the retroactive application of the *Lampf* rule did not create "fundamental rights." Accordingly, Congress had the right to enact legislation affecting those interests, so long as the legislation enacted was rationally related to a legitimate goal. Section 27A(b) easily passes that test; the legislation was not only rational, but a fair and just legislative solution to a compelling need.

Invalidating Section 27A(b) would prevent Congress from helping persons with legitimate claims who lost those claims through no fault of their own. Even more important, striking down this Act of Congress when there is no sound constitutional basis for so doing would improperly shift the balance of powers in our system of government away from Congress, leaving no branch of government with the authority to provide for the transitional rules needed to temper the inequities that are sometimes caused by retroactive application of a new judicial rule.

Accordingly, this Court should affirm the Fifth Circuit, and uphold Section 27A(b) as constitutional.

ARGUMENT

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE.

A. Section 27A(b) Was A Proper, And Indeed Essential, Exercise Of Congress' Authority Under Article I.

Article I of the United States Constitution vests all legislative powers in Congress. U.S. Const., art. I, § 1. That power includes the power to alter statutes of limitation, which this Court described in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982), as rules " 'good only by legislative grace . . . subject to a relatively large degree of legislative control' " (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

Pursuant to its power to regulate interstate commerce, U.S. Const., art. I, § 8, Congress enacted the Securities Exchange Act. Acting within its constitutional legislative authority, Congress amended the Securities Exchange Act, by enacting Section 27A, to create statutes of limitation for Section 10(b) claims pending on June 19, 1991.

1. Section 27A(b) Modified The Nation's Statutory Law To Relieve Unfairness To Victims Who Properly Relied On Existing Statutes Of Limitation And To Prevent An Unjust Windfall To Culpable Parties.

Retroactive application of the new statute of limitation announced in *Lampf* had a devastating impact nationwide. Over four and one-half billion dollars worth of claims that had been timely when filed were dismissed

pursuant to retroactive application of the new *Lampf* rule. *See Securities Investors Legal Rights: Hearing On H.R. 3185 Before the Telecommunications and Finance Subcomm. of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. 3-6 (Nov. 21, 1991) (estimating $4.578 billion worth of claims dismissed). As Senator Bryan emphasized when legislation addressing *Lampf* retroactively was introduced in the Senate, "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending." 137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Retroactive application of the new *Lampf* rule to all Section 10(b) claims pending when *Lampf* was decided would have resulted in the dismissal of the valid claims of thousands against many serious wrongdoers, including Michael Milken and Charles Keating. *See* 137 Cong. Rec. S17356 (daily ed. Nov. 21, 1991) (Sen. Domenici); *see also Securities Investor Protection Act of 1991: Hearing on S.1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102nd Cong., 1st Sess. 1-2 (Oct. 2, 1991). Hundreds of thousands of plaintiffs were placed in jeopardy of forfeiting legitimate claims through no fault of their own.

Thousands of these investors lost their life savings as the proximate result of unscrupulous conduct. *See, e.g., In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (describing conduct of the defendants in the *Lincoln Savings* case). The securities laws gave these individuals an opportunity for redress. Retroactive application of the *Lampf* decision took that opportunity away. Congress enacted Section 27A to restore that opportunity, to prevent manifest unfairness, and to correct injustice.

2. *Beam* Makes Clear That Congress Must Have The Authority To Enact Transitional Rules Required By New Judicial Statutory Interpretations.

In *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), this Court held that Courts must apply the law as they find it to pending cases. After *Beam*, Courts no longer have the discretion to provide transitional rules for new judicial interpretations of statutes applied in regular judicial course to the litigants before the Court. Courts are obliged to apply such new interpretations to all pending cases, regardless of whether that causes inequities.

New judicial rules may well cause inequitable results when applied retroactively. *See generally Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lampf, Pleva*, 111 S. Ct. at 2785-88 (1991) (O'Connor, J., dissenting). Under the Constitution, the Executive does not have the authority to address these inequities. After *Beam*, courts do not either.

Congress, the branch of the Government vested with legislative power, is the proper – and, after *Beam*, perhaps only[4] – source of such transitional rules. U.S. Const., art. I. Congress is well-suited to make the policy decisions necessary to provide for the transition between judicial rules. It has investigatory, policy making, and line drawing abilities that the judicial branch lacks. Analyzing the policy implications of new judicial rules and enacting

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[4] In *Beam*, this Court did not render a decision regarding "the bounds or propriety of pure prospectivity." 111 S. Ct. at 2448 (Souter, J.).

legislation that provides for the unanticipated impact of such rules is a normal and appropriate legislative function.[5]

The same reasons that made this Court conclude in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), that on some occasions retrospective application of a new rule is not appropriate, establish the need for some government body to have the authority to decide that new rules will not always have full retroactive application. If the judiciary is without authority to deviate from a rule of complete retroactivity, fairness and effective operation of government demand that the authority to temper such a rule be vested elsewhere in government. *See generally General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992).

Accordingly, Section 27A's enactment in response to the new judicial interpretation announced in *Lampf* was not only proper, but essential. If, as Petitioners propose, Congress is deprived of the ability to enact transitional rules, and if, after *Beam*, courts cannot provide them, inequities caused by new judicial rules will be not only inevitable, but also irremediable. No branch of government will have the authority to enact tempering transitional rules.

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[5] For example, when this Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), Congress saved municipalities from paying huge amounts in back overtime due under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* by amending the FLSA to provide that municipalities were exempt from compliance under the FLSA until after the date of the amendment. Act of Nov. 13, 1985, Pub. L. No. 99-150, 99 Stat. 787.

Petitioners might respond by arguing that Section 27A is constitutional in large part, and that Congress may enact transitional rules for all cases except those where final judgments are entered. But such an argument would ignore the nature of the legislative process. Congress must collect information and reach consensus before it acts. Accordingly, it rarely acts quickly. Indeed, the enactment of Section 27A in response to *Lampf* was relatively speedy. Unless courts stay all proceedings between the time a new judicial rule of statutory interpretation is announced and the time Congress acts in response – an impossibility both because the Court system would ground to a halt and because there is no way of knowing whether Congress will choose to act in response – or unless the rule Petitioners propose causes all parties always to file appeals, regardless of whether the appeals are meritorious, in the hope that the law will change – an undesirable result – some final judgments will always be entered. Preventing Congress from enacting transitional rules applicable to the cases where those judgments are entered would prevent Congress from performing a necessary constitutional function that only it is authorized to perform.

B. Section 27A(b) Does Not Violate The Principle In *Hayburn's Case* Or Other Separation-Of-Powers Principles.

Petitioners repeatedly emphasize the importance of "final judgments" to the independence of the judiciary. But "final judgments" are not sacrosanct. This Court has expressly upheld legislation reopening final judgments: *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980);

Fleming v. Rhodes, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Nothing in the Constitution forbids Congress from affecting final judgments by changing the applicable law, provided that Congress does not usurp adjudicative functions by "sit[ting] as a court of errors" to review those judgments. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792).[6]

When enacting Section 27A, Congress was not passing on the correctness of judicial decisions under existing law. Instead, Congress was properly exercising its legislative authority under Article I to modify this nation's statutory law.

The legislation enacting Section 27A expressly provided that "[t]he Securities Exchange Act of 1934 is amended." F.D.I.C. Improvement Act of 1991, Pub. L. No.

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[6] The rule defendants propose – distinguishing between those cases which happened to be pending because the particular district court judge was slow to apply *Lampf* retroactively or because the attorneys for the plaintiffs chose, for whatever reasons, to file an appeal – would place form over substance. If Section 27A does not offend separation of power principles as to "pending cases" since it is "legislation," not "adjudication," as seven circuits have unanimously held and Petitioners concede, *see* cases cited in n.2, *supra*; Pet. Brf. at 22, it is hard to fathom how that same legislation is adjudication when addressed toward cases where no appeal was filed.

This rule based on form, not substance, would be arbitrary and unfair. It would also create the wrong incentives, since it would encourage frivolous appeals.

102-232, § 476, 105 Stat. 2387. Section 27A modifies that Act by expressly providing a limitation period for certain claims. Whereas on June 19, 1991, *i.e.*, the day before this Court issued the *Lampf* decision, the Securities Exchange Act was silent on the issue of the limitation period for Section 10(b) claims, and whereas from June 20, 1991 through December 19, 1991, the judicially created *Lampf* rule governed, the Securities Exchange Act now specifies limitation periods for claims pending on June 19, 1991. Section 27A thus simply amended existing law, a traditional legislative function. *See Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992).

Section 27A(b) does not have the attributes of adjudication; it has attributes of legislation. Section 27A(b) does not direct any court to reach a particular outcome. Section 27A(b) leaves the task of fact finding and application of the law to facts to the judiciary. Congress has simply changed the law to which the facts must be applied. At most, Section 27A(b) makes unavailable to Petitioners a specific procedural device, without directing the outcome of the action. This Court upheld the constitutionality of similar legislation against a separation-of-powers attack in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In *Sioux Nation*, Congress enacted legislation withdrawing a *res judicata* defense in a case involving an Indian treaty. This Court rejected an argument that the legislation was unconstitutional under the separation-of-powers principles, ruling that "Congress made no effort . . . to control the Court of Claims' ultimate decision of

that claim . . . "[7] Similarly, in the case of Section 27A(b), the ultimate decision on the relevant claims will be made by the courts, not by Congress.

Petitioners argue that "even if one were to entertain the possibility that 'new law' may be interposed to reopen final judgments, Section 27A(b) is not 'legislative' in any meaningful sense" since it has no prospective effect. (Pets. Brf. at 26-27). The argument that Section 27A is not "legislative" because it has no prospective effect has been soundly rejected by the Circuit Courts to address that issue.[8]

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[7] Petitioners attempt to distinguish *Sioux Nation* by asserting that the *Sioux Nation* decision simply involved a decision by the United States to waive the defense of *res judicata*. That attempted distinction is not persuasive, however, in the context of the separation-of-powers issue. Because the separation-of-powers doctrine protects the integrity of the constitutional structure, a violation of the separation-of-powers doctrine cannot be waived by the parties to the litigation. Because legislation invalid under the separation-of-powers doctrine cannot be validated by waiver of the parties, the fact that the United States was a party to the *Sioux Nation* litigation was irrelevant to the court's conclusion that the legislation survived separation-of-powers analysis. At the very minimum, this Court's statement in *Sioux Nation* that "Congress made no effort . . . to control the Court of Claims' ultimate decision of that claim," *Sioux Nation*, 488 U.S. at 405, must be viewed as an alternative holding on the separation-of-powers issue.

[8] *See, e.g., Henderson v. Scientific-Atlanta*, 971 F.2d at 1573: *Scientific* attempts to distinguish *Audubon* on the ground that the Compromise in that case had both retroactive and prospective effect whereas Section 27A has only a retroactive effect. *See* Appellee's Supplemental Brief at 7-8. We fail to see the significance of such a distinction. The central issue is whether

Petitioners have cited no appellate case, and can cite no appellate case, that has invalidated an act of Congress on separation-of-powers grounds because the legislation at issue affected pending cases without having a prospective effect. Indeed, the most recent opinion of this Court touching on separation-of-powers issues, *Robertson v. Seattle Audubon Society*, upheld legislation that had extremely narrow prospective effect and admittedly was enacted "in response to . . . ongoing litigation." 112 S. Ct. at 1410. The legislation at issue in *Robertson v. Seattle Audubon Society* was manifestly directed at specific pending cases, and even identified those cases by docket number and caption. *See* 112 S. Ct. at 1411. Although the legislation at issue theoretically had certain prospective effect, it was limited in geography to the site of the pending cases, and by its terms would expire within a few months of its passage. *Id.* at 1410-11. To say that the limited theoretical prospective effect of that legislation is what made that legislation constitutional, is to elevate form over substance.

Moreover, in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) this Court upheld legislation with no prospective effect. The enactment at issue in *Sioux Nation* operated solely on one pending lawsuit. It provided that the court of claims would review the merits of the *Sioux*

> Section 27A violates separation of powers principles by interfering with judicial decision-making. The presence of an additional prospective effect in no way lessens such interference if it exists at all. Accordingly, we conclude that *Audubon* is controlling in this case.

See also Gray v. First Winthrop, 989 F.2d at 1570.

Nation's claims, without regard to the defense of *res judicata* or collateral estoppel. The legislation had no prospective effect, yet this Court upheld the statute against a separation-of-powers challenge.[9]

Petitioners also argue that "[u]nlike a change in law applicable to pending and future cases, *which is inherently 'legislative'* in nature, the enactment of a statute such as Section 27A(b) for the *sole purpose* of reopening closed cases between private parties is a judicial – not legislative – function beyond the purview of Congress." (Pets. Brf. at 22 (emphasis added).) That argument is premised on a faulty reading of Section 27A(b). Section 27A(b) applies to any "private civil action implied under Section 78j(b) of this title that was commenced on or before June 19, 1991 – (1) *which was dismissed as time barred . . . .* " 15 U.S.C. § 78aa-1(b) (emphasis added). That language covers not only the cases in which a "final" judgment was issued, but also those cases that were "dismissed" by the District Court but were still "pending" in the Court system because a notice of appeal was filed.

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[9] To be sure, retroactive legislation must survive constitutional scrutiny, but that scrutiny is the rational basis review applied under the due process clause, *see Pension Benefit Guaranty Corp v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), which Section 27A(b) easily passes, *see* Section II.C., *infra*.

As the Fifth Circuit notes, "While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. Const. art. I, § 9." *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39, 45 (5th Cir. 1993), *cert. granted sub nom. Morgan Stanley & Co., Inc. v. Pacific Mutual Life Insurance Co.*, 114 S. Ct. 680 (1994).

Section 27A(b) was legislation that modified existing statutory law to provide a transitional rule for a new judicial rule. Its enactment was not an instance of Congress "sit[ting] as a court of errors" overturning decisions it did not like without changing the underlying law.[10] *Cf Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Because Section 27A(b) involves legislation, not adjudication, it does not violate separation-of-powers principles.[11]

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Windfall Petitioners And Others Received From *Lampf*'s Retroactive Application Did Not Create A "Fundamental" Right Immune From Legislation Except Upon A Showing Of Compelling Need Surviving Heightened Scrutiny.

Congress has the power to adopt new statutes of limitations that apply retroactively as well as prospectively. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885). The fact that legislation revives claims that were previously adjudicated by a trial court to be time barred in no way

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[10] The statutes upheld in *Sioux Nations* and *Robertson* were far more directly aimed at particular cases than is Section 27A(b).

[11] Petitioners' concern that reopening final judgments would render them "advisory opinions" (Pets. Brf. at 23) is unfounded. Since the cases involved "cases and controversies" between opposing parties when the opinions were rendered, U.S. Const. art. III, the opinions were not advisory when rendered. Subsequent changes in the law do not render opinions advisory.

undermines the constitutionality of the legislation. In *Chase Securities*, this Court upheld as constitutional state legislation amending a limitation period for a state securities claim and reviving securities claims previously adjudicated to be time barred. *See also International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (Congress had the constitutional power to extend the period for filing discriminatory charges with the EEOC and to apply the longer period retroactively to revive charges that would otherwise have been time barred).

As this Court explained in *Chase Securities*, the protection provided by a statute of limitations "has never been regarded as what is now called a 'fundamental' right." 325 U.S. at 314. Legislatures therefore enjoy broad discretion to "repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Id.* at 311-12.[12] Like a statute of limitations itself, a judgment resting on a statute of limitations is not "fundamental" and is not immune from legislative reopening. As this Court stated in *Paramino Lumber*, "the

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[12] As Petitioners point out, in *Chase*, this Court noted that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor." 325 U.S. at 310. As discussed in the Section I.B, *supra*, however, this Court has upheld other statutes divesting parties of rights acquired in a final judgment. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100 (1947); *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1855); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). Accordingly, that dictum in *Chase* thus does not support Petitioners' position.

immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." 309 U.S. at 378.[13]

Since any property right Petitioners and the others who received a windfall from retroactive application of the *Lampf* rule had in a judgment based on the statute of limitations was not "fundamental," Section 27A(b) survives due process scrutiny so long as it is rationally related to a legitimate government interest. *See Pension*

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[13] Petitioners and other defendants similarly situated cannot tenably argue that they relied to their detriment on these judgments. At the time of the conduct underlying these suits, the statues of limitations were longer, and Petitioners and other defendants ordered their affairs accordingly. The time period between the retroactive application of the *Lampf* rule and Congress' enactment of Section 27A was only a few months. During that time period, Petitioner and other defendants were aware that Congress was considering legislation as a result of the retroactive application of the *Lampf* rule, and knew that pursuant to Fed. R. Civ. P. 60(b) courts might void their windfall judgments based on the new legislation.

Petitioners' contention that their judgment based on the retroactive application of *Lampf* was specifically intended by this Court, and thus not a "windfall," is not accurate. In *Lampf*, this Court applied a uniform federal statute of limitations for Section 10(b) claims to the litigants before the Court. In *Beam*, this Court held that *courts* should not engage in selective prospectivity; this Court *did not hold that litigants in pending cases should not be exempt from the effect of a new statutory interpretation*, simply that it was *not proper for courts* to make that determination or to engage in the process of deciding when selective prospectivity is appropriate. Congress' enactment of Section 27A, and the result Section 27A achieves, are fully consistent with the *Lampf* and *Beam* decisions.

Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) ("the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As discussed below, Section 27A(b) was not only rational, but compelled by justice and equity.

B. Section 27A(b) Easily Passes Rational Basis Scrutiny.

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Section 27A(b) was rationally designed to protect the legitimate interests of securities fraud victims who filed suit before the *Lampf* decision in reliance on the then-accepted statute of limitations, *see* 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (Senator Riegle), and to prevent an undeserved windfall for culpable parties by restoring the status quo prior to *Lampf* and confirming the expectations of the parties.[14]

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[14] Congress was also legitimately concerned with the adverse impact of *Lampf* and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) upon private enforcement of the securities laws. *See Securities Investor Protection Act of 1991: Hearings on S.1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102nd Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden,

As discussed in Section I.A. above, Section 27A(b) was far more than rational. It was a meaningful legislative response to a compelling social and economic problem. Section 27A(b) counteracted a windfall that retroactive application of *Lampf* temporarily provided culpable defendants, and alleviated unfairness to victims of fraud, including those who had the misfortune to have judges quickly apply *Lampf* retroactively in their cases and who decided that filing an appeal was not appropriate. It made our financial markets more stable and secure.[15]

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), this Court held that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Petitioners cannot come close to meeting that burden with respect to Section 27A.[16]

Chairman, SEC); *Securities Investors' Legal Rights: Hearings on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breedon); *id.* at 21-24 (Chairman Breeden); *cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988) (private suits are "an essential tool for enforcement" of the Securities Exchange Act).

[15] The Fifth Circuit was thus correct in finding "that § 27A(b) should survive any heightened scrutiny," if such scrutiny were required, but concluding that it need not survive heightened scrutiny, simply rational basis review. *See Pacific Mutual Life Ins. Co. v. First Republicbank*, 997 F.2d at 51 n.14 (5th Cir. 1993).

[16] The circuit courts that have reviewed Section 27A have concluded that Section 27A easily passes rational basis review. *See, e.g., Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1546 (10th Cir. 1992); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1574 (11th Cir. 1992); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570, 1573-74 (9th Cir. 1993).

CONCLUSION

The enactment of Section 27A(b) was a proper exercise of Congress' legislative authority. Congress amended this nation's statutory law to prevent unfairness and injustice caused by the retroactive application of a new judicial rule.

Nothing in the Constitution or in this Court's decisions makes that legislative act violative of separation-of-powers principles or of due process. Accordingly, this Court should affirm the Fifth Circuit, and uphold Section 27A(b) as constitutional.

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Respectfully submitted,

JAMES M. FINBERG
(Counsel of Record)
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California
94111-3339
Telephone: (415) 956-1000

Attorneys for *Amicus Curiae*
NASCAT

PAUL J. MISHKIN
Berkeley, California

Of Counsel